EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 10/23/

CASE NBR: 85-1-02115 CFX
SHORT TITLE: Whittaker Corp.
VERSUS: Jenkins, Perry D.

DOCKETED: Jun 23 1986

Date	Proceedings and Orders
Jun 23 1986	Petition for writ of certiorari filed.
Jul 23 1986	Brief of respondents Perry D. Jenkins, et al. in opposition filed.
Jul 30 1986	DISTRIBUTED. September 29, 1986
Aug 22 1986	Reply brief of petitioner Whittaker Corp. filed.
Oct 3 1986	REDISTRIBUTED. October 10, 1986
Oct 14 1986	REDISTRIBUTED. October 17, 1986
Oct 20 1986	Petition DENIED. Dissenting opinion by Justice White with whom The Chief Justice joins. (Detached opinion.)

85-2115

No. _____

In the Supreme Court of the United States

October Term, 1986

WHITTAKER CORPORATION,

Petitioner,

v.

PERRY D. JENKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether civil damage suits against military contractors based upon injury to or death of members of the Armed Forces in the course of military service should be permitted.

2. Whether federal common law, rather than the various state laws, should govern if civil damage suits against military contractors based upon injury to or death of members of the Armed Forces in the course of military service are permitted.

3. Whether the decision by the court below to allow a motion for discretionary prejudgment interest to be made more than ten (10) days after entry of judgment conflicts with decisions by other federal courts of appeals which hold that such motions are governed by the ten (10) day time limit of Rule 59(e), Fed. R. Civ. P.

PARTIES

The parties involved are the plaintiffs and respondents herein Perry D. Jenkins and Annabelle Jenkins, citizens of Indiana and parents of the decedent, Specialist Fourth Class Jeffrey Scott Jenkins, Stuart A. Kaneko, a citizen of Hawaii and Special Administrator of the Estate of Jeffrey Scott Jenkins (collectively "Plaintiffs"), and the defendant and petitioner herein, Whittaker Corporation, a California corporation ("Whittaker").

DESIGNATION OF CORPORATE RELATIONSHIPS

Whittaker, filing this petition for certiorari as petitioner in this proceeding, states that:

1. This is its original Designation of Corporation Relationships;

2. Whittaker is a wholly owned subsidiary of Whittaker Corporation, a Delaware corporation.

3. Whittaker does not have any subsidiaries which are not wholly owned; and

4. Whittaker does not have any affiliates.

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No. _____

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Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported at 785 F.2d 720 (9th Cir. 1986), appears in the appendix hereto as Appendix A. The decision of the District Court for Hawaii, reported at 545 F. Supp. 1117 (D. Haw. 1982), appears in the appendix hereto as Appendix B. The decisions of the District Court for Hawaii, not reported, appear in the appendix hereto as Appendicies C and D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 457:

> "In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

Rule 59(e), Federal Rules of Civil Procedure:

> "MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

STATEMENT OF THE CASE

In April, 1980 plaintiffs brought suit against Whittaker in both Hawaii state court and the United States District Court for the District of Hawaii for damages resulting from the death of Specialist Fourth Class Jeffrey Scott Jenkins ("Jenkins"). Jenkins, while on active duty with the Army, died on May 11, 1978 as a result of injuries suffered on that day from an explosion during a training exercise at the Army's Pohokuloa Training Area located on the island of Hawaii.

At the time of the accident Jenkins and the other soldiers involved had been demonstrating a type of ordnance known as atomic simulators. These are non-radioactive devices designed to depict the visual and aural effects of a nuclear explosion on the ground. One of the atomic simulators involved in the exercise had been assembled by Whittaker's

Bermite Division and delivered to the Army in Saugus, California in 1974.

The only independent Army investigations of the incident concluded that the explosion that caused the death of Jenkins did not eminate from the Whittaker atomic simulator (Picatinney Arsenal Report),[1] and that the Army personnel involved had failed to follow proper procedures, were negligent and that if proper procedures had been followed the accident would not have occurred. (White Report).[2] The jury was never allowed to hear that evidence, or to see those reports. (See Appendix A at 10-13)

Whittaker first learned of the accident some two years later when, in April 1980, it was served with the state and federal complaints. Upon being served Whittaker timely removed the state court suit to federal court where the two suits were thereafter consolidated.

Despite Whittaker's objections, Hawaii law furnished the basis upon which liability and damages were determined by the jury.

Judgment for plaintiffs was entered on August 29, 1983. Timely motions for judgment notwithstanding the verdict and for a new trial were filed by Whittaker. Plaintiffs' motion for prejudgment interest, which was their first request for any such relief, was filed on September 30, 1983.

On April 20, 1984, the district court denied Whittaker's motions for judgment notwithstanding the verdict and for a new trial, and denied plaintiffs' motion for prejudgment interest. (Appendix C) On March 18, 1985, the district court reaffirmed its denial of plaintiffs' motion for prejudgment interest because the motion had not been made within ten days of the entry of the judgment as required by Rule 59(e), Fed. R. Civ. P. The district court's reaffirmation followed a limited remand to the district court by the court below

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[1]Appendix E
[2]Appendix F

for reconsideration of the prejudgment interest issue. (Appendix D)

In its opinion the court below affirmed the district court's denial of Whittaker's motions for judgment notwithstanding the verdict and for a new trial, and reversed the district court's denial of plaintiffs' motion for prejudgment interest, expressly holding that Rule 59(e), Fed. R. Civ. P., did not apply. (Appendix A)

EXISTENCE OF JURISDICTION BELOW

The District Court for the District of Hawaii had jurisdiction over this matter on the basis of diversity of citizenship under 28 U.S.C. §§ 1332(a) and 1441(a).

REASONS FOR GRANTING THE WRIT

I

IN VIEW OF ANALOGOUS HOLDINGS BY THIS COURT DENYING A RIGHT TO SUE, WHETHER CIVIL DAMAGE SUITS AGAINST MILITARY CONTRACTORS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE SHOULD BE PERMITTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

To date, whenever this Court has considered whether to allow a civil suit which involves injuries to members of the Armed Forces arising out of activities occurring in the course of military service, it has consistently held that, because of policy considerations unique to the military, in the absence of express Congressional authorization such suit is not allowed. These same uniquely military policy considerations warrant that the court extend those holdings to preclude damage suits against military contractors based upon injury to or death of members of the Armed Forces in the course of military service.

The uniquely military policy considerations of which we speak are:

1. The impropriety of permitting suits which involve members of the Armed Forces having to testify in court as to each other's decisions and actions;

2. The benefits conferred by the Veterans' Benefits Act; and,

3. The nation's defense procurement policy which mandates that property and services be acquired for the Department of Defense in the most timely, economic and efficient manner.

In *Feres v. United States*, 340 U.S. 135 [71 S.Ct. 153, 95 L.Ed. 152] (1950), the Court refused to construe the Federal Tort Claims Act, 28 U.S.C. § 2674, as affording a remedy against the United States to a member of the Armed Forces who sustains "incident to service" what under other circumstances would be an actionable wrong. In reaching its decision the Court noted that there were "few guiding materials for our task of statutory construction." (450 U.S. at 138, [71 S.Ct. at 155]). It then invited Congress to provide a remedy if the Court had misconstrued the Act. (*Id.*) To date, Congress has not provided any such remedy.

In *Stencel-Aero Engineering Corp. v. United States*, 431 U.S. 666 [97 S.Ct. 2054, 52 L.Ed.2d 665] (1977), the Court, on the basis of the policy considerations in *Feres*, refused to construe the Federal Tort Claims Act, 28 U.S.C. § 2674, as affording an indemnification remedy against the United States to a military contractor who is sued by a member of the Armed Forces for damages resulting from injury sustained in the course of military service. The question of whether the underlying suit could be brought by the member of the Armed Forces was not raised.

One major factor upon which the Court in *Stencel-Aero* relied was that in any case concerning an injury sustained by a member of the Armed Forces while on duty, whether brought directly by the injured person or indirectly by way

of a claim for indemnification by a military contractor, at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The Court described the resulting trial as follows:

> "The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."

431 U.S. at 673, [97 S.Ct. at 2059]

This spector of a lay jury second guessing military orders, and of members of the Armed Forces having to testify in court as to each other's decisions, is equally applicable in a suit by a member of the Armed Forces against a military contractor. The instant case provides a clear example.

At trial, eleven members of the Armed Forces testified. Seven were called by plaintiffs and four were called by defendant. They testified at length about decisions and actions of Jenkins, as well as about decisions and actions of the officer in charge. The testimony placed directly in issue the conduct and the propriety of what occurred at that training exercise, and asked the jury to second guess the decisions which had been made.

This Court has recognized, albeit in a different context, "that the military is, by necessity, a specialized society separate from civilian society," *Parker v. Levy*, 417 U.S. 733, 743 [94 S.Ct. 2547, 2555, 41 L.Ed.2d 439] (1974), and that there are "very significant differences between military law and civilian law and between the military community and the civilian community. . . ," *Parker v. Levy, supra,* 417 U.S. at 752 [94 S.Ct. at 2559]. *See also, Goldman v. Weinberger,* ___ U.S. ___ [106 S.Ct. 1310, 1312-1313, ___ L.Ed.2d ___] (1986). *Accord, Chappell v. Wallace*, 462 U.S. 296, [103 S.Ct. 2362, 76 L.Ed.2d 586] (1983) (military personnel may not maintain suits to recover damages from superior officers for injuries sustained as a result of violations of constitutional rights in the course of military service.) To permit, therefore,

civilian tort and product liability laws to be engrafted through civil damage suits upon what are clearly uniquely military matters, namely training, procurement and, ultimately, the defense of the nation on the battlefield, erodes that separation.

Another factor noted in *Feres*, and relied upon by the Court in *Stencel-Aero*, was the relief afforded by the Veterans' Benefits Act. The Court recognized that it not only provides a "swift, efficient remedy for the injured serviceman, but it also clothes the Government in the 'protective mantle of the Act's limitation-of-liability provisions.'" (431 U.S. at 673 [97 S.Ct. at 2058]) The Court explained that to permit indemnification claims by a military contractor against the Government would circumvent the upper limit of liability for the Government as to service connected injuries, "thereby frustrating one of the essential features of the Veterans' Benefits Act." (431 U.S. at 673 [97 S.Ct. at 2059]).

If civil damage suits are available to members of the Armed Services against military contractors for damages for service-connected injuries, the upper limit of liability to the Government contemplated by the Veterans' Benefits Act will be indirectly circumvented when these litigation costs and damage awards are passed on to the Government "through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts[3] and through higher prices in later equipment sales." *McKay v. Rockwell Intern. Corp.*, 704 F.2d 444, 449 (9th Cir. 1983).

The nation's defense procurement policy is set forth in 10 U.S.C. § 2301(a). It states:

> "The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense

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[3]The court obviously assumed such insurance is available. Today's insurance crisis makes that assumption questionable.

in the most timely, economic, and efficient manner."

To allow military contractors to be subjected to civil damage remedies which have now reached epic proportions defeats that national policy, particularly in light of the benefits available under the Veterans' Benefits Act.

At present no federal statute expressly provides for suit by a member of the Armed Forces against a military contractor for damages resulting from a service related injury,[4] nor is there any such federal common law remedy. *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 [102 S.Ct. 980 71 L.Ed.2d 116] (1981)[5]

To the extent members of the Armed Forces have been allowed to sue military contractors for damages for service related injuries, such right has been founded upon state law, *(see e.g. Vasina v. Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969)), or, where applicable, admiralty law, (*see e.g. McKay v. Rockwell Intern. Corp.*, 704 F.2d 444 (9th Cir. 1983)). These reported cases do not, however, address whether the federal policy considerations set forth in *Feres* and *Stencil-*

[4]That Congress is presently considering legislation to protect government contractors in general, *see* H. R. Bill 4765. 99th Cong., 2d Sess. (1986), should not operate to preclude consideration by this Court of the issue now presented. First, whether Congress will act is unclear. Second, it is the judiciary which has established the rules in this area to date.

[5]In connection with the petition for a writ of certiorari the United States took the position that the veterans' claims did not arise under federal common law, thus adopting the position of the Second Circuit that no federal question jurisdiction existed. (Brief for the United States as Amicus Curiae) The question, however, of whether to permit military personnel suits against military contractors in light of the policy considerations of *Feres* and *Stencel-Aero* was not raised in *Agent Orange*, nor was that question addressed by the United States.

Aero are applicable to bar these types of suits. One pre *Stencil-Aero* case did purport to refuse to extend the policy considerations of *Feres* to military contractors. *See Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 874-875 (8th Cir. 1974). The issue, however, was not fully addressed. In addition, subsequent holdings by this Court as to the unique nature of the military as well as today's economic realities compel the conclusion that *Foster* was wrong in not extending the policy considerations of *Feres* to military contractors.[6]

In the court below, authorization to adopt state law was said to result from 16 U.S.C. § 457. (Appendix A at 7, n. 6). *See also Vasina v. Grumman Corp., supra,* 644 F.2d at 117. Whittaker submits that there is no basis in the legislative history of 16 U.S.C. § 457 to warrant a holding that it is applicable to military bases. When enacted in 1928 its focus was to give the same right of action for wrongful death to the legal representative of a person who suffered death in a place within the exclusive jurisdiction of the United States by the wrongful act or neglect of another as that legal representative would have had if the wrongful act occurred in the state within whose territory the "national park or other place subject to the exclusive jurisdiction of the United States" was situated. The limited legislative history evidences that civilians in national parks and similar type national property were who and what the Act intended to cover, not members of the Armed Forces on active duty at military bases. *See* 69 Cong. Rec. 1486. *See also* House Report 70-369. No mention of military personnel or military bases is made.

[6]Merely because a state law remedy exists does not mean it should be utilized in areas of clear federal control and concern when to do so would result in interference with and detraction from that federal control and concern. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 [90 S.Ct. 1772, 26 L.Ed.2d 339] (1970) (remedy for wrongful death under general maritime law recognized because prior use of state law remedies proved unable to assure uniform vindication of federal policies).

The uniquely military policy considerations which have operated to preclude suits against the United States by members of the Armed Forces who are injured while on active duty, and to preclude indemnification suits by military contractors whose products are involved in those military personnel injuries, dictate that the time has come for this Court to consider whether those same policy considerations, especially in light of today's economic realities, should also operate to preclude members of the Armed Forces who are injured while on active duty from suing military contractors. Reported opinions show that with the evolution of strict liability has come an ever increasing number of military personnel suits for service related injuries. More loom on the horizon.

In suggesting that military personnel not be permitted to sue military contractors for service related injuries, Whittaker is, of course, not suggesting that military contractors be absolved of responsibility for defective products. The Government still has numerous remedies which it can pursue against the military contractor,[7] and, in view of the military nature of the matter, it is the Government which should decide when and how to remedy the matter, not individual members of the Armed Forces.

II

WHETHER FEDERAL COMMON LAW, RATHER THAN THE VARIOUS STATE LAWS, SHOULD GOVERN IF CIVIL DAMAGE SUITS AGAINST MILITARY CONTRACTORS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE ARE PERMITTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At present the nation's military contractors are subject to over fifty different substantive laws in tort-product liability

[7] *See e.g.* FAR §§ 9.406-2, 52.246-2(l), 52.246-3(f), 52.246-4(d), 52.246-17(c), 52.246-18(c), 52.246-19(c); 18 U.S.C. §§ 287, 1001, 1341 and 1343.

suits brought against them by members of the Armed Forces for service related injuries. Which particular body of law will govern in any given suit, as well as to what extent, is impossible to predict. That situation (i) is illogical and unfair to the nation's military contractors, (ii) promotes forum shopping and (iii) is inconsistent with the essence of *Feres* and *Stencel-Aero*.

In *Stencel-Aero* this Court stated:

> "The relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers. The Armed Services perform a unique, nationwide function in protecting the security of the United States. To that end military authorities frequently move large numbers of men, and large quantities of equipment, from one end of the continent to the other, and beyond. Significant risk of accidents and injuries attend such a vast undertaking. If, as the Court held in *Feres*, it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries, 340 U.S., at 142, 71 S.Ct., at 157, it makes equally little sense to permit that situs to affect the Government's liability to a Government contractor for the identical injury."

431 U.S. at 672 [97 S.Ct. at 2058]

Given the fact that the relationship between the Government and members of its Armed Forces is "distinctively federal in character," and the fact that the relationship between the Government and its suppliers of ordnance is certainly no less "distinctively federal in character," it logically follows that to the extent it can be said that any sort of relationship exists between members of the Armed Services on active duty

and suppliers of ordnance, that relationship is also "distinctively federal in character," thus precluding application of state law.[8]

Given the "distinctively federal in character" nature of the relationship between the Government and its military contractors and the observatio that it makes "little sense" to permit the situs of the alleged wrongdoing to affect either the Government's liability to a serviceman or to a military contractor, *a fortiori* it equally makes "little sense" to permit the situs of the alleged wrongdoing to affect the military contractor's liability to a serviceman. Yet that situation is precisely what has evolved since *Stencil-Aero*.

We have now reached the point where the outcome of any given case by a serviceman against a military contractor will differ significantly depending upon which substantive law is adopted. As the court below stated in the instant case:

> "The laws that are colorably applicable are Hawaii, Indiana, California, or 'federal common law.' The differences in the laws would significantly affect major issues in the case, including the statute of limitations, comparative negligence, recovery for pain and suffering and lost earnings, and the standard for *res ipsa loquitur*."

Appendix A at 6, n.4

In the court below Whittaker urged at the hearing held on December 9, 1985 that in light of the recent decision in *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985), which was decided after briefing had been completed, federal common law should be held applicable, as opposed to either

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[8]On an issue basis, this federal-in-character concept has been recognized in federal courts (*see e.g. Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *In re "Agent Orange" Litigation*, 580 F.Supp. 690 (E.D.N.Y. 1984)); and in at least one state appellate court (*see e.g. McLaughlin v. Sikorsky Aircraft*, 148 Cal.App.3d. 203, [195 Cal.Rptr. 764] (1983)).

California, Indiana or Hawaii law. While the court below referenced federal common law in footnote 4 of its opinion, it failed to discuss the viability or propriety of applying federal common law.

For purposes of this petition Whittaker is not urging that either California or Indiana law apply. Rather, Whittaker's position is that if these types of suits are to be allowed, one uniform law should be held applicable. Only federal common law can accomplish that result. *Cf. Morange v. States Marine Lines, Inc., supra.*

In urging application of federal common law two possibilities exist. One, that federal common law govern the entire action; the other, that federal common law only apply to specific issues. Whittaker suggests that the better rule is that federal common law should govern the entire action.[9] Otherwise, liability will continue to depend upon the situs of the alleged wrongdoing.[10]

The problem with the current approach is that it creates conflicts among lower federal courts, as well as among state courts. For example, the present state of the law has created conflicts among lower federal courts as well as among state courts concerning whether a given issue is governed by federal common law or state law (*e.g.* government contractor defense which absolves a contractor who merely follows government plans and specifications from liability for a design defect). Compare *Bynum v. FMC Corp.*, 770 F.2d 556

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[9]A well developed body of federal admiralty law now exists to aid in defining this federal common law.

[10]This does not always mean the situs of the accident. *See, e.g. In re Air Crash Dis. at M.G. on Sept. 11, 1982*, 769 F.2d 115 (3rd Cir. 1985), *cert. denied*, ___ U.S. ___ [106 S.Ct. 851, ___ L.Ed.2d ___] (1986) (accident in West Germany, place of manufacture Pennsylvania - Pennsylvania law applied); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (accident in West Germany, place of manufacture Indiana, defendant's principal place of business Wisconsin - Wisconsin law applied).

(5th Cir. 1985) (federal common law) and *McLaughlin v. Sikorsky Aircraft,* 148 Cal.App.3d 203 [195 Cal.Rptr. 764] (1983) (federal common law) with *Brown v. Caterpillar Tractor Co.,* 696 F.2d 246 (3rd Cir. 1982) (state law) and *Tillett v. J.I. Case Co.,* 756 F.2d 591 (7th Cir. 1985) (state law).

In this case the decision in the court below (Appendix A at 19-27) (jury allowed to use *res ipsa loquitur* despite evidence of an equally plausible explanation for the second explosion which did not involve the Whittaker atomic simulator) conflicts with the recent decision in *Boyle v. United Technologies Corporation,* No. 85-2264 (4th Cir. 5/27/86) (Appendix G, at 4-6) (jury not allowed to use *res ipsa loquitur.*)

In the final analysis a state has little, if any, interest in accidents which occur on a military base and which are incident to military service. In *Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867, 870 (8th Cir. 1974), the court stated with respect to an accident occurring on a military reservation in Georgia:

> "The district court noted that five states have arguably relevant contacts with this litigation. The accident and injury occurred on a military reservation in Georgia. The allegedly defective fuse was manufactured in Iowa, the forum state, while the grenade was assembled in Texas. The plaintiff resided in the state of Washington at the time of his injury but lived in Oregon at the time of trial. On the relative strength of these contacts, the district court ruled that Iowa law should be applied since Iowa was the forum state and the fuse had been manufactured there. In discarding the relevancy of the place of injury, the court observed:
>
> > Because of the nature of the product and the place of its use, most of the reasons given for applying the lex loci delicti do not apply here. This particular product, used only for army training, poses no danger to the general population of Georgia; the state has no burden of hospitalization or treatment of persons injured by its use; and the users of this product in Georgia will more than likely be residents of other states. Under these particular circumstances Georgia has little interest in the outcome of this litigation.
>
> We agree that under the facts presented, Georgia has little if any contact with or interest in the parties or in the subject matter of this litigation."

Compare those statements with those of both the court below (Appendix A at 8-9) and the district court (Appendix B at 3-4) on the interest of Hawaii to justify applying Hawaii law. With all due respect Georgia and Hawaii are not that dissimilar.

In a recent article on federal common law the author concluded by stating:

> "In all of its choices, however, the judiciary is dominated by one presumption: the essential principle is that *state law should apply when it is not inconsistent with federal interests* for it to do so. But *federal law can apply whenever federal interests require a federal solution.*" (Emphasis the author's)

Field, *Sources of Law: The Scope of Federal Common Law,* 99 Harv.L.Rev. 881, 983 (1986)

Given the distinctively federal nature of the relationships involved and the nation's defense procurement policy as stated in 10 U.S.C. § 2301(a), the use of over fifty different bodies of law to determine liability and damages for the nation's military contractors is inappropriate.

The current lack of any semblance of uniformity as to choice of law warrants the conclusion that, at a minimum, if suits against military contractors by members of the Armed Forces for service related injuries are to be continued, whether one uniform federal common law should govern is an important

question of federal law which has not been, but should be, settled by this Court.

III

THE DECISION OF THE COURT BELOW THAT A MOTION FOR DISCRETIONARY PREJUDGMENT INTEREST IS NOT GOVERNED BY THE TEN (10) DAY TIME LIMIT OF RULE 59(e), FED. R. CIV. P., CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

With the sole exception of the court below, every federal court which has considered the question of whether a post judgment motion for or against discretionary prejudgment interest is governed by Rule 59(e), Fed. R. Civ. P., including the district court in this case, has concluded that it is. *Elias v. Ford Motor Company*, 734 F.2d 463, 464-65 (1st Cir. 1984); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983); *Goodman v. Heublein Inc.*, 682 F.2d 44, 45-47 (2d Cir. 1982); *Spurgeon v. Delta Steamship Lines, Inc.*, 387 F.2d 358, 358-59 (2d Cir. 1967); *Glick v. White Motor Co.*, 317 F.Supp. 42, 45 (E.D.Pa., 1970), *aff'd* 458 F.2d 1287 (3rd Cir. 1982); *Gilroy v. Erie-Lackawanna Railroad Company*, 44 F.R.D. 3, 4 (S.D.N.Y. 1968).

To avoid this line of consistent authority the court below sought to distinguish factually some of those cases as involving motions to "reconsider" prior awards of prejudgment interest, (Appendix A, at 33-34), and interpreted this Court's decision in *White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 [102 S.Ct. 1162, 71 L.Ed.2d 325] (1982), which held that a post judgment motion for attorneys' fees was not subject to Rule 59(e), as extending to post judgment motions for discretionary prejudgment interest.

To the extent that the court below so interpreted *White*, its decision squarely conflicts with the First Circuit's analysis of that very same issue in *Elias v. Ford Motor Co., supra*, 734 F.2d at 466. As for cases involving first time requests

to add prejudgment interest, the court below simply ignored them. *See Stern v. Shouldice, supra; Goodman v. Heublein, Inc., supra; Glick v. White Motor Co., supra*; and *Gilroy v. Erie-Lackawanna Railroad Company, supra.* In *Glick* the district court stated:

> "With respect to the timeliness of plaintiff's motion to add pre-judgment interest, it is clear that if such a motion is made under Rule 59(e) it is not timely made in this case. Spurgeon v. Delta Steamship Lines, 387 F.2d 358 (2d Cir. 1967); Gray v. Dukedom Bank 216 F.2d 108 (6th Cir. 1954). The 10 day limitation of Rule 59(e) cannot be extended by the Court under Rule 6(b) and the fact that defendants have timely moved for a new trial cannot be viewed as extending this time. However, a motion to add pre-judgment interest is not necessarily made under Rule 59(e). It may be made under Rule 60(a) which provides that 'clerical mistakes' in a judgment may be corrected 'at any time'. If the instant motion is in fact a Rule 60(a) motion and not a Rule 59(e) motion, it is timely.
>
> Whether this motion is made under Rule 59(e) or 60(a) depends on whether the pre-judgment interest plaintiff seeks is a matter of right or merely discretionary with the Court. If discretionary, it is a Rule 59(e) motion, Gilroy v. Erie-Lackawanna R.R., 44 F.R.D. 3 (E.D.N.Y. 1968) and if a matter of right it is a Rule 60(a) motion. Merry Queen Transfer Corp. v. O'Rourke, 266 F.Supp. 605 (E.D.N.Y. 1967)."

317 F.Supp. at 44-45

Under Hawaii law, prejudgment interest is a matter of discretion with the court. (Appendix C at 28-29). Rule 59(e) states that it is intended to govern motions to "alter or amend" a judgment, not simply to "reconsider" a prior ruling as the court below held. A request for discretionary

prejudgment interest, in fact, alters or amends a judgment according to all other circuit courts of appeals which have considered the question. The decision of the court below obviously conflicts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PERRY D. JENKINS, ANNABELLE JENKINS, and STUART A. KANEKO as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs-Appellees-Cross-Appellants v. WHITTAKER CORPORATION, d/b/a/ Bermite Corporation, a division of Whittaker Corporation, a California corporation, Defendant-Appellant-Cross-Appellee.	Nos. 84-2012, 84-2084 DC Nos. CV 80-0195, 80-0263 HMF OPINION

Appeal from the United States District Court
for the District of Hawaii

APPENDIX A

Honorable Harold M. Fong, Presiding
Argued and Submitted December 9, 1985
San Francisco, California

Before: TANG and WIGGINS, Circuit Judges, and WILLIAMS,* District Judge

WIGGINS, Circuit Judge

Defendant Whittaker Corporation ("Whittaker") appeals a judgment of $300,000 against it following a jury verdict in a wrongful death action by the parents and the administrator of the estate of decedent Jeffrey Scott Jenkins (collectively "plaintiffs"). Whittaker alleges the district court erred in various jurisdictional, choice of law, evidentiary, and substantive rulings. Plaintiffs cross-appeal the district court's denial of their motion for prejudgment interest. We have jurisdiction over the appeals under U.S.C. § 1291 (1982). We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Before entering the military, decedent Specialist Fourth Class Jeffrey Scott Jenkins was domiciled in Indiana, and he intended to return there after his enlistment. While in the service, Jenkins lived on a military base on federal government property within the state of Hawaii. Plaintiffs Perry and Annabelle Jenkins, Jenkins' parents, are residents and domicilaries of Indiana. Stuart A. Keneko, a Hawaii citizen, is administrator of Jenkins's estate, which is being probated in Hawaii.

Defendant Whittaker Corporation ("Whittaker") is a California corporation with its principal place of business in Los Angeles. It is a billion-dollar-a-year corporation, with between one and two percent of its revenues coming from its Bermite division. It has no offices, employees, or agent

*Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

for service of process in Hawaii, nor is it licensed to do business there.

In the early 1970's, Whittaker's Bermite division contracted to supply atomic simulators to the Army, based on the Army's design.[1] Whittaker assembled and delivered one lot of simulators to the Army in Saugus, California, in mid-1974.

On May 11, 1978, as part of demolition training for soldiers at the Pohakuloa Training Area on the island of Hawaii, Jenkins and other personnel of the 65th Engineer Batallion set up two atomic simulators about 50 feet apart. One of these simulators was from the lot provided by Whittaker (the "Whittaker simulator"); the other was manufactured by Pace Corporation (the "Pace simulator").

The Whittaker simulator was set off first and seemed to detonate normally. Engineer personnel then tried several times to detonate the Pace simulator, without success. After waiting between 10 and 30 minutes, Jenkins, Capt. William P. Fitzgerald, and another soldier approached the discharged (but still burning) Whittaker simulator to remove the ignition wires and transfer them to the Pace simulator.

As the party approached the still-burning Whittaker simulator, Jenkins expressed concern about the fire and suggested using a fire extinguisher. Fitzgerald said the fire extinguisher was unnecessary and might be needed later, and Jenkins agreed. While they were transferring the wires, a second explosion occurred, lifting the soldiers off their feet and throwing them back. Jenkins was critically injured and died that evening.

Jenkins's parents brought suit against Whittaker for themselves and on behalf of Jenkins's estate. The jury returned a verdict of $300,000 for the plaintiffs on August 12, 1983, and judgment was entered in that amount on August 29.

[1]An atomic simulator is a 55-gallon steel drum packed with explosive powder that, when detonated, simulates the visual and aural effects of a nuclear blast on the ground. It is not radioactive.

On September 30, plaintiffs moved for prejudgment interest. The trial court eventually denied the motion as untimely.[2]

I.

PERSONAL JURISDICTION

Whittaker argues that the trial court in the district of Hawaii had no personal jurisdiction over it.[3] A district court's

[2]The procedural posture of plaintiff's cross-appeal is somewhat complicated. The district court originally denied plaintiffs' motion for prejudgment interest on the ground that Hawaii law required pleading and proof of prejudgment interest as an element of damages at trial, relying on *McKeague v. Talbert*, 3 Hawaii App. 646, 658 P.2d 898 (1983). After defendant Whittaker appealed the jury verdict against it, plaintiffs timely cross-appealed the denial of their motion for prejudgment interest. While the appeal was pending in this court but before it was calendared, the district court concluded it had misread *McKeague* and, through various contacts with counsel, invited plaintiffs to move the district court to reconsider under Fed. R. Civ. P. 60(b)(6) its denial of plaintiffs' motion for prejudgment interest. Plaintiffs made this motion, and the district court indicated that it was willing to entertain and inclined to grant the motion. *See Long v. Bureau of Economic Analysis,* 646 F.2d 1310, 1318 (9th Cir.) (suggesting this procedure), *vacated on other grounds*, 454 U.S. 934 (1981). Plaintiffs then sought and received a limited remand from this court, allowing the district court to consider the motion for reconsideration. The district court reconsidered its denial of plaintiffs' motion for prejudgment interest and concluded that, despite its error in interpreting *McKeague*, denial was still required because the motion was untimely under Rule 59(e) and the court thus had no jurisdiction to entertain it (hearing held February 28, 1985; order entered, March 18, 1985). Plaintiffs then sought to amend their notice of appeal in this court to include the March 18 order and to amend the record on appeal to include the transcript of the February 28 hearing. This court denied those requests, but allowed copies of the transcript to be lodged with the clerk.

To remedy this procedural inconsistency and allow us to deal with the current ground for the denial, untimeliness under Rule 59(e), we announced at oral argument our consideration of the Rule 59(e) ground and our addition of the Feb. 28 hearing transcript to the record on appeal.

[3]Plaintiffs assert that Whittaker waived any objection to personal

jurisdiction over the person is a question of law, reviewable *de novo* by this court. *Cubbage v. Merchent*, 744 F.2d 665, 667 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985). The trial court's findings of fact are reviewed under the clearly erroneous standard. *United States v. McConney*, 728 F.2d 1195, 1200 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984).

Personal jurisdiction requires a two-part showing: (1) that the forum state has an applicable statute conferring jurisdiction on nonresidents, and (2) that the assertion of jurisdiction under the statute comports with constitutional requirements of due process. *Colonial Leasing Co. v. Pugh Brothers Garage*, 735 F.2d 380, 383 (9th Cir. 1984). Hawaii law gives jurisdiction to the full extent allowed by the Constitution, *Cowan v. First Insurance Co. of Hawaii*, 61 Hawaii 644, 649, 608 P.2d 394, 399 (1980), so the only issue we need address is whether Hawaii's jurisdiction over Whittaker comports with due process.

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jurisdiction at trial. They argue that Whittaker objected to their questioning of a Whittaker employee and to their introduction of an advertisement alleged to bear on personal jurisdiction. In seeking to exclude the ad on relevancy grounds, Whittaker's counsel said, "There is no jurisdictional issue in this trial at this time. Therefore, I would object on those grounds of relevancy." After the court overruled its objection, Whittaker sought a running objection. The court replied, "All right. Your running objection is noted. Of course it is mooted if you raise the jurisdictional issue again, but why don't [plaintiffs] proceed." Plaintiffs note that jurisdiction was never raised again until this appeal.

Plaintiffs argue that in light of Whittaker counsel's comment and attempt to exclude evidence relevant to jurisdiction, it would be unfair to allow Whittaker to argue here that the plaintiffs have not met their burden of proof.

Although Whittaker may have misled the court on this issue, plaintiffs ultimately suffered no prejudice from Whittaker's actions. Whittaker's objections were overruled and plaintiffs were allowed to submit the evidence and make their record. In light of this, we do not view Whittaker's actions as waiving the issue.

Whittaker concedes that a manufacturer that sells its products to a distributor with knowledge that the distributor will distribute the product on a nationwide basis may be sued in any jurisdiction in which the product is disseminated. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). Whittaker asserts, however, that a different standard should apply to manufacturers of military products, limiting suit to the site of manufacture or sale, relying on *McKay v. Rockwell International Corp.*, 704 F.2d 444, 452-53 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). That case, however, deals with the appropriateness of applying the ordinary consumer's expectation of safe product design to users of military products. *Id.* It in no way suggests that a *manufacturer* of military products who places those products in a nationwide distribution system has different "contacts" with a destination state than an ordinary manufacturer. *See World-Wide Volkswagen*, 444 U.S. at 291.

In light of the findings of fact, which are not disputed here, the trial court properly asserted personal jurisdiction over Whittaker.

II.
CHOICE OF LAW

Whittaker argues that the district court erred in applying Hawaii law.[4] Choice of law is a question of law reviewable *de novo* by this court. *See In re McLinn*, 739 F.2d 1395, 1398 (9th Cir. 1984).[5] Findings of fact by the district court, however, may be reversed by this court only if they are clearly erroneous. *McConney*, 728 F.2d at 1200.

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[4]The laws that are colorably applicable are Hawaii, Indiana, California, or "federal common law." The differences in the laws would significantly affect major issues in the case, including the statute of limitations, comparative negligence, recovery for pain and suffering and lost earnings, and the standard for *res ipsa loquitur*.

[5]This circuit no longer gives deference to a district court judge's interpretation of the law of the state in which he or she sits. *McLinn*, 739 F.2d at 1397-1403.

Both parties correctly note that choice of law is controlled by *Peters v. Peters*, 63 Hawaii 653, 634 P.2d 586 (1981), the only Hawaii case on the issue.[6] *Peters* creates a presumption that Hawaii law applies unless another state's law "would best serve the interests of the states and persons involved." *Id.* at 660, 634 P.2d at 591.[7] *Peters* involved a suit by a nonresident wife against her nonresident husband for injuries she sustained in Hawaii while riding in a rented car he was driving. *Id.* at 655, 634 P.2d at 588. The law of their domicile permitted interspousal tort actions; Hawaii law did not. *Id.* at 656-60, 634 P.2d at 588-91. The *Peters* court noted Hawaii's unique geographic and economic position and found that:

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[6]Hawaii choice-of-law rules apply as a result of 16 U.S.C. § 457 (1982), which provides:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

See Vasina v. Grumman Corp., 644 F.2d 112, 117 (2d Cir. 1981) (applying situs state law to cause of action arising on military property based on this section).

[7]The full passage reads:

> [W]e would not be obliged to apply the law of Hawaii if our conflict-of-laws analysis indicates that resort to New York law [the law of plaintiff's and defendant's domicile] would best serve the interests of the states and persons involved.

Peters, 63 Hawaii at 660, 634 P.2d at 591; *see also DeRoburt v. Gannett Co.*, 83 F.R.D. 574, 576-83 (D. Hawaii 1979) (anticipating the "interests analysis" approach of *Peters*).

> Our visitors are domiciled throughout the United States and in many foreign countries, and a reliance on the law of the domicile to determine the viability of interspousal actions would neither provide predictability of result nor simplify the judicial task. More importantly, any resulting significant increase in the number of tort actions entertained by our courts will adversely affect premiums indirectly payable by residents of Hawaii who lease "U-Drive" cars, though Hawaii couples remain bound by interspousal immunity and will not benefit from the judicial expansion of compulsory insurance coverage which would be responsible for the premium increase.

Id. at 666, 634 P.2d at 594-95.

The first portion of the *Peters* court's discussion applies to military personnel as well as tourists.[8] Because of Hawaii's unique strategic position, much of its economy and population depends on the military, just as another large portion depends on tourism. Military personnel, like tourists, are likely to be domiciled throughout the United States. In view of the Hawaii court's articulated concern with predictability of result and simplification of the judicial task, this fact supports the application of Hawaii law in this case. *See Jenkins v. Whittaker Corp.*, 545 F. Supp. 1117, 1118 (D. Hawaii 1982) (district court's order relying on this ground).

In addition, the accident here actually took place in the state of Hawaii, albeit on federal land, and Hawaii has an interest in protecting those within its borders from injury from defective products imported into the state. Whittaker argues that because Jenkins lived and worked on federal land, he was not actually "in Hawaii" for purposes of a choice-of-laws interest analysis. *See Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867, 870-71 (8th Cir. 1974). This is too extreme

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[8]The second portion of the *Peters* discussion does not apply to the case at hand.

and technical an approach to the choice-of-laws question, however, especially because the occurrence of the accident "in Hawaii" is what requires appplication of Hawaii choice-of-law rules in the first place. *See* 16 U.S.C. § 457 (1982).

Whittaker claims that California or Indiana law should be applied. Whittaker never specifies, however, any strong interest of those states that would best be served by applying their laws.[9] *See Peters,* 63 Hawaii at 660, 634 P.2d at 591. Nor does Whittaker identify what interests of the parties would be served by applying Indiana or California law, *id.*, aside from the obvious difference in ultimate result favoring Whittaker.[10]

Under *Peters*, Hawaii has an interest in the case and Whittaker has failed to show any compelling interest of another state requiring application of different law. The trial court was correct in applying Hawaii law.

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[9]Whittaker argues that California has an interest in limiting recovery on the contract because the contract was made and performed in California and Hawaii has no interest in it. *See* Hawaii Rev. Stat. § 490:1-105(1) (1976) (Hawaii UCC). For this reason, Whittaker argues, California's one-year statute of limitations should apply and the breach-of-warranty action should be barred. *See Becker v. Volkswagen of America, Inc.*, 52 Cal. App. 3d 794, 802, 125 Cal. Rptr. 326, 331 (1975). However, the reason California imposes a one-year limitation on personal injury actions based on breach of warranty, rather than the four-year limit in the California Commercial Code, is that California does not regard such an action as resting on the contract at all but on strict liability. *Id.* It would be anomalous, therefore, to apply the one-year California limitation on the ground that the cause of action arises out of the California contract when California itself sets that limitation on the ground that the warranty action does *not* arise out of the contract.

[10]Whittaker cannot claim it relied on California law's limitations. It was only fortuity that the injured person was not a Hawaii citizen, a circumstance that clearly would have allowed application of Hawaii law.

III.
EVIDENTIARY RULINGS

A. Standard of Review

We review trial court evidentiary rulings for abuse of discretion. *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362, 1364 (9th Cir. 1980).

B. Conclusions and Opinions in the Government Reports

Following the accident, army personnel prepared several reports. The first of these, the "Picatinny Arsenal Report" ("PAR"), was a technical analysis focused on the atomic simulator itself. It concluded that the second explosion resulted from an old unexploded demolition item on the range and that the possibility of a second explosion in the Whittaker simulator itself was "remote." It recommended continued use of other simulators in the same lot.

The second report, the "White Report," was an investigative report focused on whether army personnel complied with applicable rules and regulations. The first five paragraphs of the report consisted of observations by White of the accident area made the day after the accident. Paragraph 6 listed various "shortcomings" concerning the setup and firings of the two simulators, and paragraph 7 concluded that unauthorized operations had occurred and that the ammunition should have functioned correctly if set up correctly.

Plaintiffs moved *in limine* to exclude the opinions and conclusions in the PAR and the White report. The court excluded the opinions and conclusions in both reports[11] and sustained that decision at trial.

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[11]The court also excluded, on Whittaker's motion, a third government report on the accident. The third report, the Ganetti Report, was an "in-house" investigative report by Lt. Col. Albert Ganetti of the 65th Engineer Batallion, the unit involved in the accident. Ganetti based his report on the interviews and sworn statements of witnesses, technical manuals, and photographs of the accident site, but conducted no on-site investigation. His report concluded that the source of the second explosion was inside the barrel and that, although base personnel had not followed procedures exactly, any violations had not contributed to the accident. The court considered the three reports together and excluded the opinions and conclusions of all three at the same time.

Whittaker contends that the trial court abused its discretion in excluding the conclusions and opinions[12] in the PAR and White Report.[13] It asserts that the opinions and conclusions were admissible under the business and public records exceptions to the hearsay rule, Fed. R. Evid. 803(6) and (8)(C).[14] Whittaker correctly notes that both reports resulted from investigations made under authority of law,[15] and it argues that these conclusions and opinions were admissible as factual findings unless they were untrustworthy.

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[12]Only the opinions and conclusions in the reports are contested on this appeal. The "pure facts" in both reports either came into evidence at trial or were explicitly not offered.

[13]Plaintiffs assert that Whittaker waived its objection to the exclusion of the entire White report by offering to take the conclusions out of the report before its admission and withdrawing the offer of the report's cumulative factual assertions. This contention of waiver is without merit. Under Fed. R. Evid. 103(a)(2), error is preserved if the substance of the evidence is offered or is apparent from context. Viewing the record as a whole, the court was certainly aware of the contents of the White report and of Whittaker's unrelenting wish to have it admitted in its entirety.

[14]This rule provides that records of regularly conducted activity and public records and reports are admissible, notwithstanding the hearsay rule, "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(6), (8)(c).

[15]Plaintiffs' assertion that the reports were properly excluded under Rule 803(8)(C) because they were not *required* by law is without merit. The plain language of the rule requires only that the report be authorized, not mandated, by law. *Fraley v. Rockwell International Corp.*, 470 F. Supp. 1264, 1266 (S.D. Ohio 1979); *see also Walker v. Fairchild Industries, Inc.*, 554 F. Supp. 650, 655 (D. Nev. 1982).

Conclusions and opinions do not render reports *ipso facto* inadmissible. *Miller v. New York Produce Exchange*, 550 F.2d 762, 769 (2d Cir.), *cert. denied*, 434 U.S. 823 (1977); *see Ellis v. International Playtex, Inc.*, 745 F.2d 292, 301-02 (4th Cir. 1984) (exclusion of two government epidemiological studies on toxic shock syndrome was improper despite tentative conclusions included in studies). Whittaker argues that nothing here indicated the reports were not trustworthy and that the trial court based its exclusion solely on the ground that Rule 803(6) or (8) did not allow for opinions or conclusions as exceptions to the hearsay rule.

Contrary to Whittaker's assertion, the district court did not base its decision on that ground alone. The discussions of the exclusion, both *in limine* and during trial, show that the court addressed several other concerns in keeping the reports out.

First, the court was clearly concerned about the competence and trustworthiness of the reports. Plaintiffs' counsel noted that Mr. Labudzinski, the PAR author, had no competence or experience with atomic simulators, arrived at the accident scene over a week after the accident, never talked to any of the personnel involved, and for those very reasons had not been qualified as an expert by Whittaker. Plaintiffs' counsel also added that Mr. White, author of the White report, was even less qualified than Labudzinski.[16] Whittaker's counsel did not dispute any of these assertions, and the court ruled to exclude Labudzinski's and White's opinions immediately thereafter. The trial court is generally the best judge of the trustworthiness and reliability of such reports, *see Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 821 (19th Cir. 1981), and the circumstances surrounding the reports in question support the trial court's judgment.

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[16]White testified to his factual observations at trial. He was not qualified as an expert, however, and hence did not testify to his opinions or conclusions based on those observations. *See* Fed. R. Evid. 701 (lay opinion testimony limited to that "rationally based on the perception of the witness").

The trial court was also concerned about cumulative evidence.[17] The PAR and the White report would have put into evidence opinions and conclusions of nonexperts who could not be cross-examined, although Whittaker also intended to call an expert, Mr. Kadlec, to testify to those same opinions and conclusions at trial. Such an expert is both more trustworthy (because of his expertise) and subject to cross-examination, making his opinions far more useful to the jury than the same opinions in the reports.[18]

In summary, in light of the suspect reliability of the offered reports and the cumulative effect of their relevant passages, the district court did not abuse its discretion in excluding them from evidence.

[17]The court's general concern with unnecessary repetition is explicit in its treatment of the purely factual portions of the PAR. When Whittaker claimed that most of the facts in the PAR had already been admitted anyway, the court wondered why the same facts needed to come in again through the report, especially when it was based on hearsay.

As plaintiffs point out, all the *relevant* admissible opinions in the two reports that Whittaker claims never reached the jury were in fact testified to at trial. Expert Kadlec testified that the explosion took place outside the barrel and that the Whittaker atomic simulator functioned normally. White himself testified to the color of the drum containing the spent Whittaker simulator and the presence of loose rock in the area. Although White did not testify to his opinions that a simulator does not generate enough heat to discolor the drum or that the drum had been subjected to excessive heat from outside, those opinions are similar to opinions specifically excluded at trial because of White's lack of expertise (RT 1085:18-1087:3 (White not qualified to give opinion about reason for burnt appearance of chipboard separator)). Finally, the White report's statements about the failure to allow 30 minutes after the misfire before approaching the unexploded Pace simulator and the failure to follow other misfire procedures are irrelevant to the issues in this case and therefore were not properly admissible from *any* source. See section III(D) *infra*.

[18]Indeed, it would be anomalous if White's opinions were allowed into evidence as part of a report that is not subject to cross-examination when White himself lacked the expertise to testify to those same opinions at trial where he *could* be cross-examined.

C. LoFiego's Expert Opinion

At trial, Whittaker offered the testimony of Louis LoFiego, Vice President and Technical Director of Whittaker's Bermite division, a chemical engineer with experience with black powder and explosives of the type involved in the simulators. LoFiego had not been noticed to plaintiffs as an expert witness before trial. He testified, over plaintiffs' objections, to his education and experience, the general nature and characteristics of the explosives involved, the specific design of the Whittaker simulator, and the fact that he had never personally witnessed an ignition of confined black powder in which less than all of the powder ignited. He was not, however, allowed to express an opinion on whether less than all the black powder in an atomic simulator will ignite during what appears to experienced observers to be a normal ignition.[19]

Whittaker claims that the trial court abused its discretion in refusing to allow LoFiego to give his opinion on plaintiffs' "two explosions" theory. Whittaker argues that Lofiego clearly qualified as an expert and that, as the representative of a party, he had a right to testify as to the party's theory of how the accident happened.

The trial court properly exercised its discretion in excluding LoFiego's expert testimony, however, because Whittaker gave the plaintiffs no advance notice of the fact and substance of his expert testimony and therefore no opportunity to prepare to meet it. The plaintiffs' third set of interrogatories specifically asked for the names, credentials, and the substance and basis of the testimony of all testifying experts, as allowed by Fed. R. Civ. P. 26(b)(4)(A)(i). Whittaker named no

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[19]The question LoFiego was not allowed to answer was:

> Mr. LoFiego, assume an ignition of an atomic simulator, assume further that a mushroom cloud is observed by persons who have had prior experience with atomic simulators, assume further that those persons perceived that ignition to be a normal ignition. Given those conditions, will less that all five bags which are contained in the smoke charge barrel ignite?

independent experts in its response, for reasons not relevant here, but added: "Whittaker may call Bermite personnel, some of whom have been deposed, but is unsure whether the Court would treat their testimony as expert."[20] In addition, Whittaker apparently never supplemented its answer to this question as required by Fed. R. Civ. P. 26(e)(1).

Whittaker argues that *parties* who are also experts do not fall within the scope of Rule 26(b)(4)(A)(i), citing *Baran v. Presbyterian University Hospital*, 102 F.R.D. 272, 273-74 (W.D. Pa. 1984). *Baran* relies on the advisory committee notes to the Rules:

> It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or a viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Fed. R. Evid. 26(b)(4) advisory committee notes.

The language quoted does not apply to LoFiego. He was not a viewer or actor with regard to the disputed question; in fact, he could not be, because the question posed was hypothetical, in the traditional form of expert interrogation. The question clearly called for an opinion based on LoFiego's expertise rather than his observation of a specific incident.

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[20]Whittaker argues that plaintiffs were in any event not prejudiced by the lack of notice because they in fact deposed LoFiego and thus had ample opportunity to probe and examine his opinions, expert or otherwise, about the cause of the second explosion. LoFiego was deposed on December 5, 1980 (deposition filed Feb. 25, 1982), however, well over a year before he was noticed even as an ordinary trial witness. Without such notice, the opportunity to depose does not remove the prejudice. *See* Fed. R. Civ. P. 26(b)(4) advisory committee notes ("The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand.").

Moreover, Whittaker failed adequately to state the substance of LoFiego's testimony even as an ordinary witness in its Pretrial Statement.[21] Whittaker's entry on LoFiego read:

> 15. Louis LoFiego: Whittaker employee to testify as to the manufacture of the Whittaker simulator and Whittaker's dealing with the government and Army.

This summary gives no indication that LoFiego will testify to his opinions about plaintiffs' theory of the explosion.

In light of the lack of notice to the plaintiffs and the cumulative nature of the opinion, the trial court did not abuse its discretion in excluding LoFiego's opinion on the "two explosions" theory.

D. Relevance of Various Facts Surrounding the Accident

Whittaker also claims that the district court abused its discretion in excluding evidence of various facts that show contributory negligence by Jenkins and other army personnel. The excluded facts pertain to the Pace simulator, the simulator that did *not* explode.[22] Nevertheless, Whittaker claims, these incidents not only were relevant to Jenkins' death but proximately caused that death. In essence, Whittaker's theory

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[21]Under local district court rules, this statement must include:

> (i) Witnesses to be called. A list of all witnesses likely to be called at trial, except for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given.

Hawaii L.R. 235-7(i) (1982).

[22]Whittaker's brief specifically points out (as relevant facts excluded at trial) the unauthorized use of communications wire in connecting the Pace simulator and the failure of Jenkins's party to wait the recommended 30 minutes after the misfire of the Pace simulator before approaching it. Whittaker alludes to other acts of negligence and violations of military regulations but does not specify the other "excluded facts." Most of the facts identified here were in fact presented to the jury in one way or another.

is: but for various acts of negligence with respect to the Pace simulator, Jenkins would not have been in the area of the Whittaker simulator when the second explosion occurred and thus would not have been killed. Even assuming this statement is true, however, it resolves only the issue of *actual* cause and not, as Whittaker argues, *proximate* cause.

Proximate cause is lacking because the alleged negligence with respect to the Pace simulator has no connection with the actual injury. The acts asserted, however much they may have increased the risk of injury from an explosion of the Pace simulator, had absolutely no relation to the risk that actually matured, the second explosion at the Whittaker simulator.[23] The duty breached by the alleged negligence did not encompass the hazard that actually came about, and any such negligence is therefore irrelevant to the issue of proximate cause. *See* W. Keeton, *Prosser and Keeton on Torts* § 42 (5th ed. 1984).

For this reason, the trial court did not abuse its discretion in excluding evidence of negligence in the operation of the Pace simulator.

IV.
DIRECTED VERDICT

A. Standard of Review

Whittaker claims that Capt. Fitzgerald's action in having the soldiers approach the simulators constitutes a superseding cause of the accident as a matter of law. In effect, Whittaker claims that the evidence compels the conclusions that Fitzgerald's actions were negligent, immediately caused the accident, and were not foreseeable to Whittaker. The jury instructions allowed such findings and the jury did not make

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[23]For example, the regulation requiring 30 minutes delay before approaching a misfired simulator was obviously designed to protect the operators from a delayed explosion of the misfired simulator, not to prevent them from coming into an area where a different, unrelated explosion might occur.

them, so error exists only if the findings were legally compelled. This amounts to an argument that the court should have directed a verdict for Whittaker based on superseding cause. The standard for reviewing the propriety of a directed verdict is the same for this court as for the court below. We must view the evidence in the light most favorable to the nonmoving party and draw all possible inferences in favor of that party. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1219 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 1874 (1985).

B. Merits

Viewed in a light most favorable to plaintiffs, the evidence does not compel the conclusions Whittaker urges, and a directed verdict was therefore not appropriate. Contrary to Whittaker's assertion, there is no evidence that Fitzgerald "ordered" Jenkins to approach the burning simulator. Furthermore, although Fitzgerald's expertise was in issue at trial, the jury could reasonably have found that his behavior was not negligent, especially in view of the general agreement that the simulator was not supposed to explode twice. In addition, the jury had sufficient evidence to conclude that Whittaker could reasonably foresee personnel approaching the simulator after detonation, again because the simulator was not supposed to explode twice. In light of these reasonable conclusions, the evidence did not compel a finding that Fitsgerald's actions were a superseding cause of Jenkins' injuries and a directed verdict was not appropriate.

V.

JURY INSTRUCTIONS

A. Standard of Review

In assessing jury instructions, we consider the charge as a whole to determine whether it is misleading or misstates the law to the prejudice of the objecting party. *Smiddy v. Varney*, 665 F.2d 261, 265 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982). "We will not reverse a judgment because of a mistake in jury instructions if the instructions fairly and

adequately cover the issues presented." *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1337, *corrected*, 773 F.2d 1049 (9th Cir. 1985). An error in jury instructions in a civil trial does not require reversal it if is more probably harmless than not. *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983).[24]

B. *Res Ipsa Loquitur*

Whittaker asserts that the trial court erred in allowing the jury to apply *res ipsa loquitur* to the negligence count.[25] Whittaker claims that a *res ipsa loquitur* instruction would

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[24]Whittaker objects to the trial court's jury instructions on the issues of negligence, implied warranty, and strict liability. The jury found Whittaker liable under all three theories, and each independently supports the damages awarded. Because we approve the jury instructions on negligence and strict liability, and because the jury's verdicts on those issues are supported by substantial evidence, see below, we do not consider the propriety of the jury instruction on implied warranty.

[25]The disputed instruction is:

> On the issue of negligence, one of the questions for you to decide in this case is whether the accident involved occurred under the following conditions:
>
> First, that it is the kind of accident which ordinarily does not occur in the absence of someone's negligence;
>
> Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant originally, and which was not mishandled or otherwise changed after defendant relinquished control; and
>
> Third, that the accident was not due to any voluntary action or contribution on the part of Jeffrey Scott Jenkins, which was the responsible cause of his injury.
>
> If, and only in the event that you should find all these conditions to exist, you are instructed as follows:
>
> From the happening of the accident involved in this case, you may draw an inference that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

have been permissible only if the jury could have found that Whittaker had "control and management" of the simulator at the time of the accident. Under Hawaii law, however, *res ipsa loquitur* requires a finding of exclusive control and management of the injury-producing instrumentality only at the time of the negligence, not at the time of the resultant injury. *See Guanzon v. Kalamau*, 48 Hawaii 330, 337, 402 P.2d 289, 294 (1965); *Ciacci v. Woolley*, 33 Hawaii 247, 258-59 (1934).

Whittaker also claims that a *res ipsa loquitur* instruction was improper because evidence at trial permitted an inference that the second explosion did not come from the Whittaker simulator. Whittaker misconstrues the point at which *res ipsa loquitur* is applicable in this case; the jury instruction explicitly made the application of *res ipsa loquitur* conditional on other findings. Specifically, before the jury was permitted to infer Whittaker's negligence under *res ipsa loquitur*, it was required to find by a preponderance of the evidence that the accident was caused by the Whittaker simulator. This requirement allowed the jury to weigh Whittaker's evidence concerning the source of the second explosion. The instruction permitted the jury to find negligence under *res ipsa loquitur* only if it found Whittaker's evidence of a second explosion outside the barrel unpersuasive.[26]

Under Hawaii law, the trial court gave the correct *res ipsa loquitur* instruction.

> However, you shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless you believe, after weighing all the evidence in the case and drawing such inferences therefrom as you believe are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant. (RT 1548:4-1549:3)

[26]Moreover, even if Whittaker's proffered evidence had tended to directly disprove its negligence, as Whittaker seems to argue it did, rather than to disprove the second explosion in the simulator, as it in fact did, the *res ipsa loquitur* instruction would still have been proper. Under Hawaii law, *res ipsa loquitur* merely *allows* an inference of negligence "in the absence of any explanation by the defendant tending to show that the injury was not due to his lack of care." *Ciacci v. Woolley*, 33 Hawaii 247, 257 (1934) (quoting *Morgan v. Yamada*, 26 Hawaii 17, 24 (1921)). The jury would still have been allowed to consider any contrary evidence Whittaker might have presented.

C. Strict Liability

Whittaker also claims that the trial court erred in its jury instruction on strict liability.[27] Whittaker argues that the trial court's jury instruction on strict liability amounted to a *res ipsa loquitur* instruction and that *res ipsa* is inapplicable to strict liability. The Hawaii Supreme Court stated that state's rule of strict liability as follows:

> [O]ne who sells or leases a defective product which is dangerous to the user or consumer or to his

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[27]The disputed instruction reads:

> Plaintiffs claim damage for personal injuries alleged to have been caused by a defective condition in an M142 atomic simulator manufactured and sold by defendant Whittaker Corporation.
>
> A product is in a defective condition if, because of its manufacture or design, the product does not meet the reasonable expectations of the ordinary consumer or user as to its safety.
>
> In determining whether or not the M142 atomic simulator was defective, you are instructed that plaintiffs need not prove a specific defect. It is sufficient if you find from the evidence that the M142 atomic simulator exploded twice, causing the accident, as a result of some failure due to a defective condition in the M142 atomic simulator.
>
> If you determine, after considering all of the evidence, direct and circumstantial, that the accident here would not have occurred in the ordinary course of events but for the existence of a defect in the M142 simulator, then you can infer that the cause of the accident arose from a defect in the simulator.

> property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property, if (a) the seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased.

Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 75, 470 P.2d 240, 243 (1970) ("essentially" adopting *Second Restatement of Torts*, § 402A). In the present case, Whittaker does not dispute that it was in the business of selling atomic simulators. A second element, the absence of substantial change, is clearly required by the jury instruction given by the trial court.[28]

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[28]For example, the trial court's instructions provided at various points (emphasis added):

> The manufacturer of an article is subject to liability for injuries proximately caused by a defect in manufacture of the article *which existed when the article left possession of the manufacturer*. . . .
>
> In order for plaintiffs to recover against Whittaker on their claim of manufacturing defect, the plaintiffs have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following essential elements.
>
> . . . .
>
> 2. That the atomic simulator was expected to and did reach Jeffrey Scott Jenkins *without substantial change in the condition in which Whittaker first sold it*. . . .
>
> . . . .
>
> The defendant Whittaker is liable only for defective conditions *which were present at the time Whittaker sold the atomic simulator and parted with possession of it*. Unless you find that Jeffrey Scott Jenkins' death was caused by a defective condition in the Whittaker atomic simulator *which was in existence when it was first sold to the army in 1974*, none of the plaintiffs are entitled to recover from Whittaker.

The trial court's jury instructions also adequately required the jury to find the remaining elements of liability: defect and cause. These elements may be proved by purely circumstantial evidence. *Stewart v. Budget Rent-A-Car*, 52 Hawaii at 77, 470 P.2d at 243-44; *accord, McCrossin v. Hicks Chevrolet, Inc.*, 248 A.2d 917, 920 (D.C. App. 1969). In most jurisdictions, purely circumstantial evidence of a defect will suffice to take the case to the jury provided that the plaintiffs have introduced evidence on two other points. "First, plaintiff must present evidence which would tend to negate causes for an accident other than a defect in the product." *Stewart v. Ford Motor Co.*, 553 F.2d 130, 137 (D.C. Cir. 1977) (collecting cases); *see also Wakabayashi v. Hertz Corp.*, 66 Hawaii 265, 271, 660 P.2d 1309, 1313 (1983) (allowing case to go to jury based on purely circumstantial evidence of defect where plaintiff presented evidence tending to negate plaintiff's actions as cause of accident). "Second, plaintiff must present proof which would suggest that whatever defect might have existed was one introduced into the product by the defendant." *Stewart v. Ford Motor Co.*, 553 F.2d at 137 (collecting cases); *cf. Guanzon*, 48 Hawaii at 337, 402 P.2d at 294 (requiring control and management of the injury-producing instrumentality at the time of the negligence for application of *res ipsa loquitur*). The amount of evidence necessary to meet these two requirements is not great. *Stewart v. Ford Motor Co.*, 553 F.2d at 137 (collecting cases).

In the present case, plaintiffs provided evidence on both these points. In response to Whittaker's only alternative theory of the accident, the explosion of a "dud" already present on the range, plaintiffs introduced evidence that the range was inspected for duds before the atomic simulators were set up and that the ground near the Whittaker simulator was smooth and undisturbed by potholes after the second explosion. On the issue of Whittaker's responsibility for the

defect, plaintiffs presented evidence suggesting that the atomic simulator was in substantially the same condition at the time of the accident as it had been when Whittaker delivered it to the army. *See Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 637-38 & n.4 (8th Cir. 1972) (allowing recovery under strict liability without proof of specific defect where airplane "was substantially in the same condition at the time of the crash as when it was delivered by McDonnell to the Navy [and] that it was being used for its intended purposes"). This evidence met the requirements and allowed the jury to find the existence of a defect based on circumstantial evidence alone.

Whittaker's reliance on California cases, *e.g., Barrett v. Atlas Powder Co.*, 86 Cal. App. 3d 560, 565, 150 Cal. Rptr. 339, 342 (1978), that disallow *res ipsa loquitur*-type instruction for strict liability is inappropriate. The procedural effects of *res ipsa loquitur* in California and Hawaii are quite different, and that difference goes to the heart of the reasoning that led California courts to forbid the doctrine in strict liability cases. *See Tresham v. Ford Motor Co.*, 275 Cal. App. 2d 403, 408, 79 Cal. Rptr. 883, 885-86 (1969). Under California law, the application of *res ipsa loquitur* shifts the burden of production[29] to the defendant; unless the defendant then comes forward with evidence suggesting that it was not negligent or that its negligence did not proximately cause the injury, the jury is *required* to find that the accident resulted from the defendant's negligence. Cal. Evid. Code § 646 Law Revision Commission Comment (Deering 1985 Supp.). The doctrine of *res ipsa loquitur* raises a rebuttable presumption of negligence, entitling the plaintiff to a directed verdict in the absence of contrary evidence.

Such a presumption, the California courts hold, is inappropriate in imposing strict liability. To avoid a directed

[29]The application shifts only the burden of production, not the ultimate burden of persuasion. *Frantz v. San Luis Medical Clinic*, 81 Cal. App. 3d 34, 42-43, 146 Cal. Rptr. 146, 152 (1978).

verdict, a defendant would need to come forward with evidence that the product in question was *not* defective or did *not* proximately cause the injury. This is a much more difficult burden than producing proof of the exercise of due care to rebut a presumption of negligence. In many strict liability cases, the product involved will be damaged or destroyed, making proof of the lack of a defect virtually impossible. To avoid this presumption and avoid putting defendants in this untenable position, California does not allow *res ipsa*-type instructions on strict liability issues.[30] *Tresham*, 275 Cal. App. 2d at 408, 79 Cal. Rptr. at 885-86.

Under Hawaii law, application of *res ipsa loquitur* raises no presumption of negligence. The doctrine merely establishes a prima facie case of negligence; it allows the case to go to the jury. It permits but does *not* compel a finding of negligence, even in the absence of contrary evidence.[31] *Turner v. Willis*, 59 Hawaii 319, 324--25, 582 P.2d 710, 714 (1978). *Cozine v. Hawaiian Catamaran, Ltd.*, 49 Hawaii 77, 87-88, 412 P. 2d 669, 678 (1966) (citing *Guanzon v. Kalamau*, 48 Hawaii 330, 335 n.3, 402 P.2d 289, 292 n.3 (1965).[32] As a result, a defendant need not come forward with rebuttal evidence to avoid a directed verdict.

[30]It would be possible, of course, to use similar wordings for the negligence and strict liability instructions and assign them different procedural effects. This would undoubtedly be confusing for the jury, however, especially because most products liability claims include both negligence and strict liability counts. The California court wisely chose to prevent the presumption in cases in which it is not appropriate by simply forbidding the language that would raise it.

[31]The circumstantial evidence supporting the application of the doctrine *may*, of course, be so great as to compel an inference of negligence, *see, e.g., Winter v. Scherman*, 57 Hawaii 279, 283, 554 P.2d 1137, 1140 (1976), but the application of *res ipsa loquitur* does not *alone* compel such a finding. *Cozine v. Hawaiian Catamaran, Ltd.*, 49 Hawaii 77, 87-88, 412 P. 2d 669, 678 (1966).

[32]The jury here was not allowed to infer a defect simply from the fact of the accident. It was also required to find that the Whittaker simulator exploded twice, causing the accident. It was

Because the doctrine raises no presumption, the reasoning underlying the California courts' refusal to extend the doctrine to strict liability does not apply. The burden of production does not shift, and the Hawaii defendant faces no burden of obtaining often unobtainable rebuttal evidence. The defendant is free to argue that, despite the fact that the accident in question was one which does not *normally* occur in the absence of a defect, there was in fact no defect in this case, even if the defendant cannot otherwise account for the accident.

Consequently, nothing bars application of the *res ipsa loquitur* theory to strict liability. *Stewart v. Ford Motor Co.*, 553 F.2d at 138. This is reflected in Hawaii cases that permit recovery in strict liability based on *res ipsa*-like theories of circumstantial evidence. *See Wakabayashi*, 66 Hawaii at 270, 660 P.2d at 1313-14; *Stewart v. Budget Rent-A-Car*, 52 Hawaii at 75, 470 P.2d at 243-44. In fact, the *Stewart* court in dictum approved a finding of defect based on evidence far less direct than that allowed by the jury instruction in the present case:

> In the most extreme circumstances a court might hold that where no specific defect can be shown, recovery is to be allowed anyway as a carefully driven vehicle does not leave the road in the absence of a defect in the car. See Vanek v. Kirby, [253] Ore. [494], 450 P.2d 778 (1969). See Note, *Proof of Defect in a Strict Products Liability Case*, 22 Me. L. Rev. 189 (1970).

Stewart v. Budget Rent-A-Car, 52 Hawaii at 76 n.5, 470 P.2d at 244 n.5.

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therefore the fact of the second explosion in the barrel that allowed inference of the defect, not the mere fact that he accident occurred. Hawaii law permits such an infernce. *See Stewart v. Budget Rent-A-Car*, 52 Hawaii 71, 77, 470 P.2d 240, 244 (1970) (testimony of witness to events surrounding accident sufficient to allow inference of defect); *see also Wakabayashi v. Hertz Corp.*, 66 Hawaii 265, 270, 660 P.2d 1309, 1313-14 (1983).

Moreover, the instructions given are very similar to strict liability instructions approved in product liability cases in other jurisdictions. *See, e.g., Stewart v. Ford Motor Co.*, 553 F.2d at 136; *Dennis v. Ford Motor Co.*, 332 F. Supp. 901, 903 (W.D. Pa. 1971), *aff'd*, 471 F.2d 733, 735 (3d Cir. 1973); *cf. Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir. 1971) (finding error in instruction that did not reflect this theory); *Moraca v. Ford Motor Co.*, 132 N.J. Super. 117, 332 A.2d 607, 610 (1974), *aff'd*, 66 N.J. 454, 332 A.2d 599 (1975) (same).

In summary, we find that the trial court's interpretation of Hawaii law was correct, and the instructions given by the trial court were appropriate.

VI.

BASIS OF JURY VERDICT

A. Standard of Review

A jury's verdict may not be disturbed by this court if it is supported by substantial evidence. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 877 (9th Cir.), *cert. denied*, 105 S. Ct. 329 (1984).

B. Necessity of Expert Witnesses

Whittaker in effect claims that the jury's conclusion that the accident involved here "is of a type that does not ordinarily occur in the absence of negligence" is unsupported by substantial evidence. Because the product and issues involved were of a technical nature, Whittaker argues, the jury could not have reached that conclusion on its own, *cf. Lyu v. Shinn*, 40 Hawaii 198, 202 (1953) (in medical malpractice actions, *res ipsa loquitur* does not apply where the common knowledge or experience of the jury does not allow it to conclude that a patient's condition would not have existed but for the defendants' negligence), and plaintiffs failed to supply any expert evidence to show how a second explosion in the barrel could have occurred. We need not determine whether expert testimony was required here, however, because in any event

it was provided on the key issue: that the atomic simulator was designed to explode only once.[33]

In the ordinary application of *res ipsa loquitur*, jurors know the normal operation of the injury-producing instrumentality. For example, in *Wakuya v. Oahu Plumbing & Sheet Metal, Ltd.*, 2 Hawaii App. 373, 636 P.2d 1352 (1981), *aff'd*, 65 Hawaii 592, 656 P.2d 84 (1982), the plaintiff was injured by a vault door handle that came off in her hand as she opened the vault. In holding that the jury should have been instructed on *res ipsa loquitur*, the Hawaii court noted:

> Here, [defendant] Oahu had the responsibility, by contract, for what is described therein as "preventative maintenance" of the instrumentality, including the vault door handle. *Obviously, one of the purposes of the handle on the vault door was that it was to be used in opening the vault door.* This required someone turning and then pulling on the handle. *Obviously, such handles are not supposed to come off in the course of doors being opened in the absence of negligence,* particularly where, as here, ordinary wear and tear on the mechanism is to be dealt with by "preventative maintenance" by Oahu.

Id. at 381, 636 P.2d at 1358 (emphasis added); *accord, Winter*, 57 Hawaii at 281, 554 P.2d at 1139 (holding that car does not normally fail to negotiate gentle curve, cross center line, travel on opposite shoulder parallel to pavement for 225 feet and hit utility pole in absence of driver's negligence); *Cozine*, 49 Hawaii at 83, 412 P. 2d at 676 ("It requires no expert testimony to enable a jury to infer that in the ordinary course of events and if due care is used the mast of an excursion boat does not snap off, otherwise the patrons of such boats would be few."); *see also Kicklighter v. Nails by Jannee, Inc.*,

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[33]Not only was this point made explicitly several times during the trial, it was clearly a basic premise of both sides' arguments and certainly was never disputed by Whittaker.

616 F.2d 734, 741 (5th Cir. 1980) (Georgia law looks to "common human experience" to determine whether an event is of a type not normally occurring absent negligence).

Few lay jurors, it is true, would have in their accumulated experience any knowledge of the technical details of an atomic simulator. This case, however, does not require such knowledge; it merely requires that the jury be informed of what was "obvious" to the jury in *Wakuya*: the normal operation of the injury producing instrumentality, a single explosion. Eyewitness testimony supports the jury's finding that the second explosion came from the Whittaker simulator. Because the jury knew that the simulator was designed to explode only once and reasonably found that it exploded twice, the jury could also reasonably have found that a second explosion would not ordinarily occur in the absence of negligence.[34] *See Ciacci*, 33 Hawaii at 257-58; *Wakuya*, 2 Hawaii App. at 381-82, 636 P.2d at 1358-59.

Whittaker claims that more is needed, that expert testimony must show *how* a second explosion could have occurred or *how* Whittaker's negligence could have caused it.[35] Such a showing would of course be helpful to plaintiffs, but it is

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[34]This finding alone would not be sufficient to attribute the negligence to Whittaker, as it does not provide a ground for determining whether the negligence was in the Army's design or Whittaker's manufacture. In the present case, however, Whittaker itself, in arguing its position that the second explosion did not and in fact could not have come from the Whittaker simulator, presented much evidence that the simulator as designed would explode only once. This evidence was sufficient for the jury to find that there was no defect in design, and, when combined with the finding that the second explosion would not ordinarily occur in the absence of negligence, supported the jury's finding that the Whittaker simulator was defective in manufacture. (The jury specifically found, on a jury form urged by Whittaker, that the simulator was not defective in design but was defective in manufacture.)

[35]Plaintiffs' claim, that such testimony was provided when Whittaker's expert Dr. Kadlec testified that the explosion could

not required. For example, the *Wakuya* court approved a *res ipsa loquitur* instruction notwithstanding its observation that "[h]ow or why the handle came off is not explained by the evidence." *Wakuya*, 2 Hawaii App. at 382, 636 P.2d at 1359; *cf. also Wakabayashi*, 66 Hawaii at 269-71, 660 P.2d at 1313 (holding in strict liability context that testimony of eyewitnesses provided sufficient evidence of defect to go to jury without any direct evidence, expert or otherwise, of any specific defect).

C. Control and Management

Whittaker also argues that no substantial evidence supports the jury's conclusion, implicit in its finding of negligence based on *res ipsa loquitur*, that the Whittaker simulator was substantially unchanged from the time Whittaker delivered it to the Army to the time of the accident. Whittaker points out that the simulator was unpacked several times and stored in an outdoor area, arguing that this shows something could have happened to it after delivery.

Whittaker's evidence does not preclude a finding that the simulator was "substantially unchanged," however; it merely weighs against that finding. "[I]t is enough [to justify the *res ipsa loquitur* instruction] if the plaintiff produces sufficient evidence of careful handling in general, and of the absence of unusual incidents, to permit reasonable persons to conclude that, more likely than not, the event was due to defendant's negligence." W. Keeton, *Prosser and Keeton on Torts*, § 39 (5th ed. 1984); *accord, Ciacci*, 33 Hawaii at 258-59.

Here, plaintiffs presented evidence that the simulator had been stored and inspected by the army, and there was no evidence of unusual incidents. The jury's finding that the atomic simulator was substantially unchanged from the time it left Whittaker's hands to the time of the accident is therefore supported by substantial evidence.

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have come from the simulator, takes that passage far out of context. Whittaker is correct in claiming that no expert discussed *how* a second explosion could have taken place in the Whittaker simulator.

VII.
CONSISTENCY OF JURY VERDICT

A. Standard of Review

Whether a verdict is consistent is a question of law reviewable *de novo* by this court. *See McConney*, 728 F.2d at 1201.

B. Consistency

Whittaker argues that the jury's verdict is inconsistent because it found a manufacturing defect but not a design defect. The jury instructions told the jury that it could not find Whittaker liable for a design defect if the government designed the simulator, Whittaker built it according to the government's design, and Whittaker warned the government about any patent errors in the design or dangers from the product.[36] The jury found Whittaker was not liable for a design defect; therefore, Whittaker argues, it must have concluded that Whittaker built the simulator according to the government's design, which is inconsistent with its finding of a manufacturing defect.[37]

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[36]The relevant instruction was:

> The defendant Whittaker is not subject to liability for a design defect in the atomic simulator if Whittaker establishes, by a preponderance of the evidence:
>
> 1. That the United States established, or approved, reasonably precise specifications for the atomic simulator;
>
> 2. That the atomic simulator conformed to those specifications; and
>
> 3. That Whittaker warned the United Statees about patent errors, if any, in the government's specifications, or about dangers, if any, in the use of the atomic simulator that were known to Whittaker but not to the United States.

[37]The jury returned a special verdict of a manufacturing defect based in part on the following instruction:

Whittaker's logic is flawed. The "design defect" instruction Whittaker points to only serves to absolve it of liability *once a design defect is established.* In this case, the jury never even considered Whittaker's liability for a design defect because it concluded that there *was no* design defect. There is no inconsistency, therefore, with the jury's finding of a manufacturing defect arising from Whittaker's failure to conform to the government design. Whittaker's proposed result would be absurd, as it would never allow the finding of a manufacturing defect without simultaneous design defect.

VIII.
MOTION FOR PREJUDGMENT INTEREST

A. Standard of Review

Interpretation of the Federal Rules of Civil Procedure is a pure question of law, reviewable *de novo* by this court. *Liberty Mutual Insurance Co. v. Equal Employment Opportunity Commission*, 691 F.2d 438, 440 (9th Cir. 1982).

B. Applicability of Rule 59(e)

Plaintiffs claim that the district court erred in ruling that plaintiffs' motion for prejudgment interest was a Rule 59(e) motion to alter or amend a judgment, which must "be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). They claim that their motion was brought under Fed. R. Civ. P. 7(b),[38] the general motions rule, and

> In order for the atomic simulator to be in a defective condition at the time of sale to the United States Army, it must have been manufactured in a way that did not conform with the plans and specifications furnished to Whittaker by the United States Army and it must have had a propensity for causing physical harm to the user beyond that which would be contemplated by the product's foreseeable and typical user who uses it, with the ordinary knowledge common to the foreseeable and typical user as to its characteristics.

[38]Plaintiffs' moving papers in the district court indeed characterized the motion as a Rule 7(b) motion, but the substance of the motion rather than the form determines which Rule it falls under. *See United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984).

therefore is not subject to Rule 59(e)'s time limitations.[39] This is an issue of first impression in this circuit.

Rule 59(e) was intended to deal with the correction of error, not the initial granting of relief. *See* 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 59.03 (2d ed. 1985). The Supreme Court described this role in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982), in which it considered whether attorney's fee awards were within the Rule's scope:

> [Rule 59(e)'s] draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to *rectify its own mistakes* in the period immediately following the entry of judgment. . . .
>
> Consistently with this original understanding, the federal courts generally have invoked Rule 59(e) only to support *reconsideration of matters properly encompassed in a decision on the merits.* . . . By contrast, a request for attorney's fees under [42 U.S.C.] § 1988 raises legal issues *collateral to the main cause of action*—issues to which Rule 59(e) was never intended to apply.
>
> Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require *an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one*

[39]Plaintiffs do not deny that the motion was untimely under Rule 59(e) or that timely compliance with Rule 59(e) is jurisdictional. *See* Fed. R. Civ. P. 6(b) and 59(e); *Martin v. Wainwright*, 469 F.2d 1072, 1073 (5th Cir. 1972), *cert. denied*, 411 U.S. 909 (1973).

party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguihshable from other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are *not compensation for the injury giving rise to an action.* Their award is *uniquely separable from the cause of action to be proved at trial. . . .*

As the Court of Appeals for the Fifth Circuit recently stated:

> "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but *merely seeks what is due because of the judgment.* It is, therefore, not governed by the provisions of Rule 59(e)."

Id. at 450-52 (emphasis added; footnotes and citations omitted).[40]

All the emphasized passages apply to a postjudgment first-time motion for prejudgment interest as well as to one for attorney's fees. Such a prejudgment interest motion does not ask the court to reconsider or correct its own mistakes, because the court has not previously considered or decided the issue.[41] The motion addresses an issue collateral to the main cause of action, requiring an inquiry unrelated to the merits that cannot be made until the moving plaintiff has "prevailed" on the merits.[42] Prejudgment interest compensates not for

[40]This purpose is also suggested by the fact that Rule 59(e) sets the same ironclad 10-day time limit as other motions to reconsider the merits. *See, e.g.*, Fed. R. Civ. P. 50(b) (j.n.o.v.), 52(b) (amend findings of fact), & 59(b) (new trial).

[41]This assumes that an award of prejudgment interest is, as here, discretionary with the court. If an award is mandatory, the court has committed a clerical error in omitting it and a party may move for correction under Rule 60(a). *See Glick v. White Motor Co.*, 458 F.2d 1287, 1293-94 (3d Cir. 1972).

[42]For example, in determining the appropriateness of prejudgment interest, a court may consider the timing and reasonableness

the *injury* giving rise to the action, but for the *delay* between injury and judgment. *See, e.g., Lucas v. Liggett & Myers Tobacco Co.*, 51 Hawaii 346, 348-49, 461 P.2d 140, 143 (1969). Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time. In light of these factors, *White* strongly suggests that a postjudgment first-time motion for prejudgment interest is not covered by Rule 59(e).

Furthermore, the consequences to litigants of a contrary result are potentially severe. If a motion for prejudgment interest must be made under Rule 59(e), prevailing parties will have only a ten-day window for requesting what may be a major portion of their ultimate losses. Moreover, because the actual entry of judgment is often a clerical function, a prevailing party may often not be able to anticipate exactly when the "window" will open.

Elias v. Ford Motor Company, 734 F.2d 463 (1st Cir. 1984), which Whittaker cites for the motion's inclusion under Rule 59(e), is factually distinguishable. Although the *Elias* court states that prejudgment interest is not a "collateral matter" like attorney's fees, the original judgment in that case actually included prejudgment interest, and the prevailing plaintiff had and declined the opportunity to appeal the award. *Elias*, 734 F.2d at 464-65. The disputed motion in *Elias* asked the court to *reconsider* a decision it had already made and was therefore, the court concluded, a Rule 59(e) motion.[43]

of the parties' respective settlement offers and the amount and causes of delays in trial, as plaintiffs here argued below. Neither of these will be finally known until a decision on the merits has been reached.

[43]The other cases cited by Whittaker are even less on point. Another First Circuit case, decided just after *White*, mentions *White* but doesn't consider that case's effect on a prejudgment interest motion. *See Goodman v. Heublein, Inc.*, 682 F.2d 44, 45-47 (2d Cir. 1982). *Spurgeon v. Delta Steamship Lines, Inc.*, 387 F.2d 358, 358-59 (2d Cir. 1967), a pre-*White* case, relies heavily on the fact that the actual damage award entered in the judgment (and therefore subject to direct appeal) already included prejudgment interest.

In light of *White* and the policy underlying Rule 59(e), we hold that a postjudgment first-time motion for prejudgment interest is not a Rule 59(e) motion to alter or amend the judgment but a general motion subject to the general constraints of Rule 7. The motion for prejudgment interest is remanded to the district court for the exercise of its discretion.[44]

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Plaintiffs (appellees/cross-appellants) shall be awarded their costs on appeal.

Finally, *St. Mary's Hospital Medical Center v. Heckler,* 753 F.2d 1362. 1365 (7th Cir.), *cert. denied,* 105 S.Ct. 3502 (1985), merely holds that Rule 59(e) encompasses any motion that draws into question the correctness of the judgment. This again is addressed to error and, as discussed above, the trial court here could not have made an error as to prejudgment interest because it never considered the issue.

[44]Plaintiffs invite this court to award prejudgment interest itself rather than remand to the district court for such an award. They argue that such interest is routine in wrongful death cases and that the district court has already stated its intention to award such interest. They also note that over seven years has passed since the accident and further delay should be avoided.

Plaintiffs cite no statute that gives this court the jurisdiction to make such an award. *But cf. Lucas,* 51 Hawaii at 351-52, 461 P.2d at 144 (Supreme Court of Hawaii awards interest itself to avoid further delay to plaintiff). Even assuming our power to address plaintiff's claims, however, it would be inappropriate for this court to award interest here. As is evident from the memorandum accompanying plaintiff's original motion for prejudgment interest, such an award requires consideration of factors beyond this court's knowledge, such as settlement attempts and responsibility for delays. For this reason, remand is necessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PERRY D. JENKINS, ANNABELLE JENKINS, and STUART A. KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, a California Corporation, Defendant..	)	CIVIL NO. 80-0195
PERRY D. JENKINS, ANNABELLE JENKINS, and STUART A. KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, a	)	CIVIL NO. 80-0263

APPENDIX B

California Corporation, JOHN DOES 1-10, DOE CORPORATIONS 1-10, and DOE PARTNERSHIPS 1-10,

Defendants.

AMENDED RULING IN LIMINE RE CHOICE OF LAW

The parties have requested the Court to make a ruling *in limine* regarding the choice of law in this wrongful death action. The essential facts are that the plaintiffs' decedent was killed in an explosion at the United States Army's Pohakuloa Training Range on the Island of Hawaii on May 11, 1978. The decedent, Jeffrey Scott Jenkins, was a serviceman involved in a military training exercise when an atomic explosion simulator manufactured by defendant Whittaker Corporation ("Whittaker") allegedly malfunctioned, exploded unexpectedly and killed him.

The choice of law question arises from the fact that the decedent's parents, plaintiffs in this suit, are citizens of Indiana, while the defendant is a "citizen" of California, and the allegedly defective device was manufactured and purchased in California. Plaintiffs assert that Hawaii law governs this suit, but the defendant urges the Court to apply either Indiana or California law, principally the latter.

Beyond peradventure, a federal court exercising its diversity jurisdiction must apply the choice of law rules of the state in which it sits. *E.g., Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). The choice of law in the instant case, therefore, is governed by the only Hawaii case that has adopted choice of law rules, *Peters v. Peters,* 63 Hawaii 653 (1981).

Peters was a tort suit in which the choice of law question was whether to apply the inter-spousal tort immunity laws of Hawaii, where the injury occurred, or those of New York, where the parties were residents. Although the facts of *Peters*

bear little relevant resemblance to those in this case, the choice of law principles articulated by the state supreme court nevertheless provide adequate guidance here.

After an extensive discussion of the evolution of choice of law rules in general, the court concluded that: "The preferred analysis, in our opinion, would be an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation." *Id.* 664. Of particular importance here, the court, in deciding to apply Hawaii law, found that: "Our visitors [to the State of Hawaii] are domiciled throughout the United States and in many foreign countries, and a reliance on the law of domicile to determine the viability of interspousal actions would neither provide predictability of result nor simplify the judicial task." *Id.* 666. Furthermore, the court placed considerable importance on the effect its decision would have on the citizens of Hawaii in general.

Applying the generalized concerns evinced by the Hawaii Supreme Court in its choice of law decision, I find that Hawaii law is the appropriate law to apply in the present case. First, it significantly simplifies the judicial task to apply Hawaii law. Second, because so great a portion of Hawaii's population is military, many of whom are legal residents of many different states and many of whom are subject by vocation to the risk of injury, it would provide significant predictability of result to apply the law of Hawaii to product liability actions arising from injury to military personnel in this state.

Finally, and perhaps most importantly, Hawaii has a distinct interest in having its laws applied in cases such as this in order to give its citizens the level of protection the state deems appropriate. I am unconvinced by the defendant's argument that the deceden s injured on U.S. Government property and therefore not "in" Hawaii at all. I find this too technical and constricted an approach. Whenever defective products are imported into this state, whether by civilians or by the military, Hawaii's citizens are placed in

potential danger. It is not unreasonable, therefore, to expect the manufacturers of such products to face the liabilities imposed by the State of Hawaii. That a defective product happens to harm a non-resident rather than a resident should neither alter the result nor constitute a fortuity for the tortfeasor.

Accordingly, IT IS HEREBY ORDERED that, unless otherwise ordered by the Court, the substantive law of the State of Hawaii shall control in this lawsuit.

DATED: Honolulu, Hawaii, August 10, 1982.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PERRY D. JENKINS, ANNABELLE JENKINS, and STUART KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, a California corporation, Defendant.	)	CIVIL NO. 80-0195

PERRY D. JENKINS, ANNABELLE JENKINS, and STUART A. KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, a	)	CIVIL NO. 80-263

APPENDIX C

California corporation, JOHN DOES 1-10, DOE CORPORATIONS 1-10, and DOE PARTNERSHIPS 1-10,

Defendants.

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL, ORDER REGARDING MOTION TO REVIEW TAXATION OF COSTS AND ORDER DENYING MOTION FOR PREJUDMENT INTEREST

This court, having considered the defendants' Motion for Judgment Notwithstanding the Verdict or For a New Trial and Motion to Review Taxation of Costs, and the plaintiffs' Motion for Prejudgment Interest, the memoranda supporting these motions, the arguments of counsel, and having these matters under submission, finds as follows:

I. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The defendant, Whittaker Corporation has made a motion for a judgment notwithstanding the verdict or, in the alternative, a new trial.

When considering a motion for a judgment notwithstanding the verdict, the standard of review to be applied by this court is whether there is substantial evidence present that could support a finding, by reasonable jurors, for the non-moving party. In considering such a motion, this court may not *weigh* the evidence, but may only consider whether the non-moving party presented sufficient evidence to meet the "substantial evidence" standard. *United States v. Harvey,* 661 F.2d 767, 772 (9th Cir. 1982); *Chisholm Bros. Farm Equipment Co. v. International Harvester Co.,* 498 F.2d 1137, 1140 (9th Cir.), *cert. denied,* 419 U.S. 1023 (1974). The standard for granting a judgment n.o.v. is the same as those governing the direction

of a verdict. *Fountila v. Carter,* 571 F.2d 487 (9th Cir. 1978); *Cockrum v. Whitney,* 479 F.2d 84 (9th Cir. 1973).

A motion for a new trial, on the other hand, affords the trial court more discretion. Nonetheless, as the Ninth Circuit has instructed:

> The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . .
>
> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. [citations omitted]

Fountila v. Carter, 571 F.2d 487, 490 (9th Cir. 1978), citing *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944).

The defendant has cited the following grounds for the motion for judgment notwithstanding the verdict, or alternatively for a new trial:

> 1. The evidence is insufficient to sustain the jury's verdict;
>
> 2. The jury's verdict is based upon speculation and/or compromise and is inconsistent;
>
> 3. The court erred in precluding defendants from introducing certain evidence;
>
> 4. The court erred in instructing the jury on *res ipsa loquitur*;

5. The court erred in instructing the jury on implied warranties;

6. The preponderance of the evidence established a superseding cause;

7. The preponderance of the evidence established that Jenkins was contributorily negligent; and

8. Portions of the jury's damages award are excessive and not supported by the evidence.

This court will deal with each of the asserted grounds in turn.

A. Sufficiency of the Evidence to Sustain the Verdict.

Whittaker Corporation's (Whittaker's) first argument is that the evidence presented at trial was insufficient to support the verdict. This argument is based on two premises.

The first of these is that there was no evidence to show that the second explosion which killed Jenkins came from the atomic simulator. This court recalls the evidence at trial, and finds that there was substantial evidence that the second explosion emanated from the atomic simulator.

Three eyewitnesses testified that the second explosion came from the barrel. No eyewitnesses testified that the explosion appeared to come from any other location. Although defendant asserted at trial that the explosion could have come from a munitions dud located somewhere outside the barrel, no positive evidence in support of this theory was presented. Rather, eyewitnesses testified that the area around the simulator was searched for duds prior to detonation of the simulator, and none were found. In addition, the uncontradicted testimony of eyewitnesses was that there was no cratering, fragmentation, displacement of the simulator barrel, or other indicia that the explosion had occurred outside but near the barrel. Further, eyewitnesses testified that the barrel was discolored at the top two-thirds of the barrel after

the first explosion, but was completely discolored after the second explosion. One of Whittaker's own experts, Dr. Kadlec, issued an opinion letter just prior to the first trial date in March of 1983, in which he stated that, in his opinion, the second explosion was caused either by a dud munition outside the barrel or by a second explosion from within the barrel itself. He testified at trial that either explanation was possible.

Second, Whittaker asserts that expert testimony was required to support the plaintiffs' theory that the atomic simulator exploded twice. The defendant's argument is actually an assertion that it offered expert opinion to the effect that a second explosion could *not* have taken place, therefore the plaintiffs were required to produce expert testimony to rebut Whittaker's expert evidence. Whittaker cites cases for the proposition that where a subject of inquiry is not within the general knowledge or common experience of the laymen, expert opinion must be presented to establish the existence of the fact, e.g., *Miller v. Los Angeles County Flood Control Dist.*, 8 Cal. 3d 689, 106 Cal. Rptr. 1 (1973), and *Truman v. Vargas,* 275 Cal. App. 2d 976, 80 Cal. Rptr. 373, 376 (1969). This court does not quarrel with this proposition.

Defendant cites various cases from other jurisdictions to the effect that the fact of an explosion must be established by expert testimony, citing *Redmond v. Ouachita Coca-Cola Bottling Co.,* 76 So. 2d 553 (La. App. 1954); *Phillips v. Delaware Power & Light Company,* 216 A.2d 281, 284 (Del. 1966); *Randolph v. Collectramatic, Inc.,* 590 F.2d 844, 848 (10th Cir. 1979). These cases, however, are distinguishable from the case at bar.

The case of *Redmond v. Ouachita Coca-Cola Bottling Co.,* 76 So.2d 553 (La. App. 1954) was an exploding coke bottle case. Contrary to Whittaker's interpretation of the case, the *Redmond* court ruled that the plaintiffs' lay testimony was sufficient to meet the burden required to invoke the doctrine of *res ipsa loquitur.* However, the court concluded that the

expert evidence in that case was so compelling that the defendant was entitled to judgment n.o.v. Unlike this case, however, the experts in *Redmond* conducted a study of the bottle fragments themselves and found a bruised area and cone of percussion that conclusively established that the bottle was broken by external impact rather than internal pressure.

Although Whittaker attempts to analogize this case to *Redmond* by arguing that "the only expert testimony in evidence negates the plaintiffs' theory" (Defendant's Memo. Supporting Motion for J.N.O.V., p. 17), this court does not agree. The defendant's own expert, Dr. Kadlec, acknowledged an alternative possibility that the explosion could have emanated from the barrel. Although his ultimate conclusion was that the explosion had not come from the barrel, the jury was entitled to disregard this conclusion if it found that this opinion was premised on an erroneous assumption of facts regarding the location of Jenkins prior to the explosion, and regarding the direction he was thrown by the explosion. In addition to Dr. Kadlec's testimony, Whittaker presented the testimony of two experts, Jess Hickman and Louis LoFiego to the effect that in their experience in working with the atomic simulators, they had never observed a second explosion following a mushroom cloud from the first explosion, nor had they ever observed a partial ignition of the five powder bags in the simulator. This evidence was not sufficiently conclusive to show the scientific impossibility of a second explosion in the simulator. Similarly, this case is distinguished from *Scalzo v. Marsh,* 13 Wis. 2d 126, 108 N.W. 2d 163 (1961) where the court found that the fact of odorization was "verified conclusively as a scientific fact by proper expert testimony." 108 N.W. 2d at 175.

In *Randolph v. Collectramatic,* 590 F.2d 844 (10th Cir. 1979), the plaintiff was allowed to present lay testimony on the source of the explosion, but not as to the issue of whether the explosion was *caused* by a defect in the source product. In that case, unlike the one at bar, the plaintiff was precluded by the law of the state of Oklahoma from using the doctrine

of *res ipsa loquitur* to reach the jury on the issue of defect. Thus, a verdict in favor of the defendant was directed at the close of the plaintiff's case, in the absence of expert testimony.

The case of *Phillips v. Delaware Power & Light Co.,* 216 A.2d 281 (Del. 1966) is also inapposite. In that case, the Delaware Supreme Court affirmed the trial court's ruling in favor of the defendant on summary judgment. In that case, the court agreed that the expert evidence presented only "possibilities" as to the cause of a gas main break, and thus a jury verdict would be based only on speculation and conjecture. *Id.* at 284. The court went on to observe that:

> There can be instances where, even though the experts are unable to give an opinion of probability, other evidence shows the likelihood of a given cause. [citation omitted]. No such evidence is pointed out to us in this case.

Id.

The court finds that in light of the evidence discussed above, the jury's finding that the atomic simulator was the source of the second explosion was not the result of "speculation and conjecture." Rather, this court finds that there was substantial evidence supporting the verdict.

B. Propriety of the Jury Verdict.

1. Sufficiency of the Evidence.

Defendant argues first that the jury verdict was based on conjecture and compromise because there was no direct evidence of 1) the location of the second explosion; 2) any manufacturing defect; 3) any design defect, or 4) any negligence.

The first argument with respect to the location of the second explosion has already been considered in the previous discussion of the sufficiency of the evidence to justify the jury verdict. It will not be repeated here.

The third ground cannot be considered an argument for impeaching the jury verdict since the jury specifically found that there was no design defect in the design of the simulator.

The fourth ground may not be considered as a reason for overturning the jury's verdict, because the doctrine of *res ipsa loquitur* was available to the plaintiffs in this case to allow them to go to the jury on the issue of negligence.

With respect to the second ground of contention, this court finds as follows:

The jury did find that the atomic simulator had been manufactured defectively. The court finds that there was substantial evidence supporting this conclusion. First, there was evidence to suggest that any defect in the simulator dated from 1974. The testimony of Glenn White, Whittaker's witness revealed that two inspections of the lot of simulators in which the subject was included occurred between 1974 and the date of use. The second of these inspections occurred within a year of the incident at issue. These inspections did not indicate any deterioration or change in condition which would cause their recall, or other action. Moreover, there was considerable testimony at trial as to the good condition of the simulator at the time it was set up for firing on the date of the explosion. Specifically, witnesses testified that there were no holes, rust, moisture, missing parts or other evidence of deterioration or misuse. Capt. Fitzgerald testified that when he opened the simulator lid, it appeared that the simulator was being opened for the first time.

The court finds that this testimony presented substantial evidence that the condition of the simulator had remained unchanged from the date of manufacture to the date of the incident.

Additionally, the distinction which the jury drew between a manufacturing defect dating from 1974, rather than a design defect, is well supported by the evidence. Much evidence was presented on the number of simulators which had been fired and had functioned normally. The jury had no evidence that

any other simulator had malfunctioned by exploding twice. From the evidence presented to it, the jury was entitled to reason that the defect in the simulator at issue here did not result from a design defect, because such a defect would be common to all simulators manufactured under the same specifications. Thus, the jury could properly conclude that the defect in the subject simulator was unique.

2. Consistency of Jury Verdict.

Defendant asserts that the jury's verdict is inconsistent in finding a manufacturing defect, but not a design defect. This argument is based on defendant's interpretation of this court's instructions to the jury, specifically the language of Court's Instructions No. 17 and No. 23.

Court's Instruction No. 17 states in part that:

> In order for the atomic simulator to be in a defective condition at the time of sale to the United States Army, *it must have been manufactured in a way that did not conform with the plans and specifications furnished to Whittaker by the United States Army*. . . . (emphasis added)

Court's Instruction No. 23 states in part:

> *The Defendant Whittaker is not subject to liability for a design defect in the atomic simulator* if Whittaker established, by a preponderance of the evidence:
>
> 1. That the United States established, or approved reasonably precise specifications for the atomic simulator;
>
> 2. *That the atomic simulator conformed to those specifications*. . . . (emphasis added)

The defendant asserts that in finding *no liability* for a design defect, the jury must have necessarily found that the *design* conformed to government specifications. Therefore, the jury was not entitled to find that the simulator was not

manufactured according to government specifications in order to find a manufacturing defect.

Defendant's argument is based on an incorrect reading of Court's Instruction No. 23. The instruction does not list the elements required to *find* a design defect. Rather, it lists the elements required under *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983) to absolve a government supplier from liability for a design defect in a product designed according to government specifications, once such a defect is established by the evidence. The instruction did not preclude the jury from simply deciding, based on the evidence presented, that the simulator did not contain any design defect. Indeed, Instruction No. 23 need not have been applied by the jury at all, if it found no design defect.

It must also be emphasized that *McKay* does not absolve a government contractor from liability for a *manufacturing* defect in a product. *Id.* at 451. To follow defendant's interpretation of the law would circumvent the clear intent of the *McKay* court in refusing to free military suppliers from liability for negligently manufactured products.

3. Impeachment of the Jury Verdict.

Defendant argues that a compromise verdict can be inferred from the final figure of $300,000. It is well-settled under Hawaii law that:

> [A] finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.

Orso v. City and County of Honolulu, 56 Haw. 241, 249 (1975) (collecting cases).

This court does not find that the rounding off of the special damage award from $ 2,712.80 to 3,000.00 to be sufficient grounds for overturning the jury's damage award under the standard set forth above.

Defendant has further attempted to impeach the jury verdict by relating the comments of two jurors in its memorandum. Even if the defendants had presented this information in the form of a proper affidavit, it would be incompetent evidence to impeach the jury's verdict in this case. Fed. R. Evid. 606(b).

C. Exclusion of Certain Evidence Offered By Defendant.

1. Exclusion of Conclusions and Opinions in the Labudzinski and White Reports.

Defendant objects to the court's exclusion of opinions and conclusions contained in reports compiled by Glenn White and Fred Labudzinski. Defendant claims that these opinions and conclusions were admissible as "factual findings" under Fed. R. Evidence 803(8)(C). That Rule states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> * * *
>
> (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * *
>
> (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. . .

This court concluded both at the time of the motion *in limine* and at the time these reports were offered into evidence at trial, that the same were not admissible under Rule 803(8)(C).

Neither of the preparers of these reports were qualified as munitions experts. The reports are compilations of observations and conclusions of undisclosed individuals, many of whom were not at the scene of the incident or involved in the investigation of the incident. Thus, this court found that the conclusions and opinions contained in these reports were untrustworthy, and thus not admissible under Rule 803(8)(C). This court did not preclude, however, the use of factual observations made in the report.

Having reconsidered its ruling yet a third time, this court declines to reverse its previous ruling on the admissibility of the conclusions and opinions in these reports.

2. Exclusion of LoFiego's Expert Testimony.

At trial, this court precluded Louis LoFiego, Vice President and Technical Director of Whittaker's Bermite Division from testifying as an expert on the issue of whether a second explosion could have taken place in the simulator. Mr. LoFiego was never designated as an expert by the defendant, nor did the defendant provide a summary of this expert opinion or the bases of that opinion, as required by local practice.

This court concluded that the plaintiffs would be substantially prejudiced if Mr. LoFiego were allowed to testify as an expert without notice to the plaintiffs, and without opportunity to the plaintiffs to depose him on his opinions.

In any event, the identical expert opinion was elicited from the defendant's witness, Jess Hickman. Thus, Whittaker was not prejudiced by the exclusion of Mr. LoFiego's testimony.

3. Exclusion of Testimony on Range Regulation Violations.

Defendant argues that this court erred in excluding evidence of certain range regulations which were violated with respect to an independent firing of a second atomic test simulator on May 11, 1978. The defendant argues again that it should have been allowed to present evidence of Jenkins' alleged

negligence in connection with another firing of another atomic simulator as proof supporting a finding for contributory negligence causing his death.

This court excluded the proffered evidence as irrelevant and prejudicial under Fed. R. Evidence 403. The case of *Kaneko v. Hilo Coast Processing*, 65 Haw. 447 (1982) does not support the defendant's position. The fact that the Hawaii Supreme Court has adopted the doctrine of comparative negligence in the context of strict liability does not relieve the defendant of the burden of showing that the negligence sought to be proven is causally related to the injury. In this case, the alleged negligence Whittaker sought to prove at trial was so clearly removed from the incident at issue that this court deemed that it could only have a prejudicial effect on the jury's consideration of the issue. The Ninth Circuit precedent cited by the defendant does not lessen the requirement that the negligent conduct proven be causally related to the injury in order to be considered by the jury on the issue of comparative negligence. In *Sears v. Southern Pacific Co.*, 313 F.2d 498 (9th Cir. 1963), the court considered the scope of the evidence of the defendant's negeligent acts which could be admitted into evidence, and concluded that;

> [T]he jury is entitled to consider all the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties.

Id. at 502.

However, the language in the *Sears* opinion cannot be cited for the proposition that evidence of *any* negligence can be admitted, regardless of the consideration of proximate cause. *See Pan-Alaska Fisheries, Inc. v. Marine Constructions and Design Co.*, 565 F.2d 1129 (9th Cir. 1979)("When we find that the 'fault' of each party will be compared, what we mean by 'fault' is that party's blameworthy conduct which contributes to the proximate cause of the injury."); *Jones v. Bender Welding and Machine Works, Inc.*, 581 F.2d 1331

(9th Cir. 1978)(Plaintiff's conduct not considered contributory negligence where there is no proximate cause "even assuming that it was an unreasonable decision.")

Thus, this court delcines to reverse its earlier ruling that the evidence of Jenkins' unrelated negligent conduct was inadmissible at trial.

D. Instructions on Res Ipsa Loquitur.

Defendant argues that this court erroneously instructed the jury on the doctrine of *res ipsa loquitur*. They assert that the jury should not have been instructed on the doctrine for four reasons: 1) plaintiffs failed to introduce any expert testimony from which an inference of negligence could be made; 2) the atomic simulator was not in the control and management of Whittaker at the time of the accident and Whittaker had no right to such control and management; 3) evidence in the record permitted an inference that the second explosion did not occur as a result of Whittaker's negligence; 4) *res ipsa loquitur* is not applicable to strict liability.

In making the first argument, the defendant refers back to its argument on the lack of expert testimony to establish the location of the second explosion. This court has already addressed the issue of the need for expert testimony on the issue of the *source* of the explosion, and concluded that none was needed in light of the substantial testimony from eyewitnesses. In addition, the defendant is apparently arguing that expert testimony was needed to show that negligence was responsible for the second explosion. This court recalls that there was ample testimony from experts on both sides on the operation of the atomic simulator and there is no question that the simulator was constructed to fire once when performing normally. This court concludes that the jury was entitled to find, based on the expert testimony offered in this case, that a second explosion, which was admittedly an abnormal occurrence, was the type of incident which would only occur because of a negligently-caused defect in the simulator.

Defendant renews the argument that *res ipsa loquitur* is not applicable in this case because the defendant did not have management and control over the simulator at the time the second explosion took place. This argument was previously rejected by this court in defendant's pretrial motion for summary judgment on the plaintiffs' *res ipsa loquitur* count. At that time, this court construed Hawaii law to permit the plaintiffs to invoke the doctrine of *res ipsa loquitur* where it could be shown that the defective product was under the management and control of the defendant at the time of *negligence,* though not at the time of injury. *See Ciacci v. Woolley,* 33 Haw. 247, 258 (1947). In this case, as previously discussed, there was substantial evidence that the simulator was in the same condition as when it left the manufacturer, and that the defect which caused the second explosion arose at the time of manufacture.

Defendant's third argument, to the extent it is applicable to Hawaii law, is based on a misreading of *Turner v. Willis,* 59 Haw. 319 (1978) and the other cases cited in support of its argument. *Turner* does not state, as argued by defendant, that the jury cannot be instructed on *res ipsa loquitur* if the evidence is subject to another inference on the issue of negligence. Rather, the *Turner* court merely held that it was error to give an instruction which *compelled* rather than *permitted* an inference of the defendant's negligence under the doctrine of *res ipsa loquitur. See also, Cozine v. Hawaiian Catamaran,* 49 Haw. 77, 85 (1966)(where injury could have been caused by other than defendant's negligence, *res ipsa loquitur* instruction permitting, but not compelling, inference of negligence is proper.) *Cf. Guazon v. Kalamu,* 48 Haw. 330, 336 (1965)(failure to give *res ipsa loquitur* instruction not error where defendant's version of the accident was uncontradicted). In this case, the instruction given was not infirm under *Turner.* Plaintiffs' additional argument that there was no evidence to sustain a finding of a manufacturing defect has been previously discussed, and rejected.

Finally, defendant argues that *res ipsa loquitur* is not applicable in a strict liability case. This court finds that instructions as given to the jury did not permit it to apply the inference of negligence permissible under *res ipsa loquitur* to a theory of strict liability.

E. Instruction on Implied Warranties.

Defendant objects to the court's instructions to the jury on the issue of implied warranties. It is clear under Hawaii law that the warranty of merchantability is implied into every sales transaction. *Ontai v. Straub Clinic & Hospital, Inc.*, 66 Haw. 241, 254 (1983). The applicability of the implied warranty of fitness for a particular purpose is to be determined from the circumstances of the particular case. Whether the buyer in a particular transaction was in fact relying on the seller's skill and judgment is a matter for the jury to decide based on the facts of the case. *Id.*

Defendant argues that the reasoning of *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), precludes the application of implied warranties to products used by servicemen. This court does not agree. *McKay* was decided under federal admiralty jurisdiction, while the court's jurisdiction in this case was based on diversity between the parties, and Hawaii law was applied.

Defendant has raised the additional argument that the implied warranty of fitness for a particular purpose does not apply in this case on state law grounds. Defendant relies on the Advisory Comments to section 2-315 of the U.C.C. (H.R.S. § 409:2-315) which state that the warranty does not apply in cases where the buyer provides specifications.

At the time jury instructions were settled, this court understood defendant's objection to plaintiffs' proposed instruction 14 to be addressed to the issue of the government contractor's defense. Upon review of the record, it appears that counsel's objection could be interpreted to raise the state law grounds argued in this motion. However, the grounds

raised by counsel at this juncture do not warrant overturning the jury's verdict.

Assuming, for purposes of argument, that it was erroneous to instruct the jury on the issue of implied warranties, such error was harmless. This court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61. To grant a motion for a new trial becuase of harmless error constitutes an abuse of discretion.

It is true that the general rule requires that when one of several theories of liability submitted to the jury should not have been submitted, "a *general verdict* . . . cannot stand." *Morrissey v. National Maritime Union of America,* 544 F. 2d 19, 26 (2d Cir. 1979) (emphasis added). This is so because the court, faced with a general verdict, cannot have confidence that the same verdict would have been rendered had the improper theory not been submitted for the jury's consideration. *Id.* at 27.

The verdict in the instant case was rendered upon special interrogatories. Though the jury did find that Whittaker had breached an implied warranty, it further found that Whittaker was also liable on the independent ground of negligence in manufacture of the M142 atomic simulator. Where, as here, the jury's Verdict Upon Special Interrogatories clearly indicates that the outcome would have been the same had the alleged error not occurred, then that error did not affect Whittaker's substantial rights, and, thus, was harmless.

As to defendant's argument that plaintiffs failed to present any evidence of the existence of a defect in the simulator in July 1974, that argument has been previously dealt with and rejected by this court.

F. Jury Findings Re: Superseding Cause.

The defendant argues that the preponderance of the evidence established a superseding cause for Jenkins' death -- that being the instructions given by Capt. Fitzgerald to approach the simulator after it fired, and his instructions

to approach downrange from the second Pace simulator fired that day.

Hawaii law is clear that a defendant is not excused from its negligence by the negligence of a third person, unless that third party's negligence is the "sole proximate cause of the plaintiffs' injury." *Ontai v. Straub Clinic & Hospital, Inc.* 66 Haw. 241, 252 (1982). Thus, in this case, the question is whether the evidence was such as to permit the jury to conclude that Fitzgerald's conduct was not the sole proximate cause of Jenkins' death. In light of the evidence supporting the jury's findings of a manufacturing defect, and the resulting second explosion which caused Jenkins to be thrown to the ground, the jury was entitled to find that Fitzgerald's conduct was *not* the sole proximate cause of the injury.

Defendant further argues that the court's jury instruction used the term "immediate cause," while the special verdict form used the term "sole proximate cause," and this inconsistency precluded the jury's fair consideration of the issue of superseding cause. This argument is without merit. First, this court does not find that the use of the two terms is inconsistent to the extent that it precluded the jury's fair consideration of the issue of superseding cause. Second, to the extent that the term "immediate cause" is inconsistent with the term "sole proximate cause" the defendant cannot complain that the use of the former phrase precluded fair consideration of the issue, since that term was used in the jury instructions at the instance of the defendants. To so argue is tantamount to arguing that the defendant invited error. As to the latter phrase, the defendant cannot argue that the use of the term "sole proximate cause" was incorrect since this language is taken directly from the *Ontai* opinion itself, and reflects a correct statement of Hawaii law.

G. Jury's Finding Re: Contributory Negligence.

The defendant argued to the jury that Jenkins was contributorily negligent in approaching the simulator, failing to unwind the simulator wire to its full extent, and in using

a blasting machine instead of a battery to detonate the simulator. The jury disagreed. This court concludes that on the basis of the evidence presented, the jury could conclude that these actions did not constitute contributory negligence. Thus, this court declines to overturn the jury's verdict on this point.

H. Amount of the Jury Verdict.

Finally, defendant argues that the jury verdict in this case is excessive as to the amount of special damages, and the amount awarded for pain and suffering.

This court has already rejected the argument that the jury's award of special damages should be rejected because the jury apparently rounded the award up to $3,000.00 from $2,712.80.

On the issue of conscious pain and suffering, the jury was presented with two differing expert opinions. The jury apparently accorded greater weight to the testimony of Dr. McNamara. This court finds that Dr. McNamara's opinion on the issue of conscious pain and suffering was sufficiently supported by medical records and data available to allow the jury to reach its conclusion that the decedent's estate should be awarded $30,000.00 for pain and suffering. Thus, this court declines to overturn the jury's verdict as to pain and suffering.

For the foregoing reasons, The Motion for Judgment Nothwithstanding the Verdict, or in the Alernative, a New Trial is DENIED.

II. DEFENDANT'S MOTION TO REVIEW COSTS.

After the trial of this case, plaintiff's counsel tendered a bill of costs to the clerk of the court. The clerk disallowed $1,448.70 for "office xerox expenses," and taxed costs in the amount of $13,201.97. The clerk of the court entered the Notice of Taxation on September 19, 1983. On September 26, 1983, the defendant filed a motion to review taxation of costs, pursuant to Fed. R. Civ. Pro. 54(d). The clerk's taxation of costs is reviewable by the district court on a *de*

novo basis addressed to the sound discretion of the court. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 233 (1964).

Costs are awarded to the prevailing party as a matter of course, absent express statutory provision, unless pursuant to Rule 54(d) of Fed. R. Civ. Pro., the court otherwise directs. The standard of review is abuse of discretion. *National Organization of Women v. Bank of California,* 680 F.2d 1291, 1294 (9th Cir. 1982); *United California Bank v. THC Finance Corp.*, 557 F.2d 1351, 1361 (9th Cir. 1977); *Feher v. Department of Labor and Industrial Relations,* 561 F. Supp. 757 (D. Haw. 1983).

The taxability of the prevailing party's costs are governed by statute. In this case, the pertinent statutes are 28 U.S.C. §§ 1821, 1920, and 1923. Each item of costs will be dealt with in turn.

A. Fees of the Clerk and Marshal.

The first two items in the plaintiffs' bill of costs are fees of the clerk and marshal totalling $191.44. 28 U.S.C. § 1920(1) provides that the clerk of the court may tax as costs fees of the clerk or marshal. The defendant objects to certain clerk's fees on the grounds that "plaintiffs may in fact be entitled to some or all of these costs; but until more detail is provided, these costs cannot be taxed against Whittaker." The defendant cites no authority for the proposition that the clerk's and marshal's fees must be justified to the opposing party on an item-by-item basis to warrant taxation.

This court has reviewed the items listed in the Bill of Costs under the sections entitled "Clerk's Fees" and "Marshal's Fees," and the court is satisfied that the plaintiffs did not incur any unnecessary fees, and is entitled to amounts listed, totalling $191.44.

B. Court Reporter's Fees.

The third item listed is $124.80 for a transcipt of trial proceedings on July 25 and 26, 1983. Plaintiffs claim that

the transcipt costs are taxable under 28 U.S.C. 1920(2) which states:

> A judge or clerk of the court may tax as costs the following:* * *
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.

Plaintiffs explain more fully in their memorandum that the July 25 transcript was obtained to allow plaintiffs' counsel to review the court's ruling excluding evidence of the Aguilar incident. The July 26 transcript of the defendant's opening argument was ordered by plaintiffs so that plaintiffs' counsel could use it for closing argument. While plaintiffs' counsel may have felt that these transcripts were helpful to him, daily transcripts are ordinarily considered a luxury and are not taxable to the losing party, particularly where counsel's objective is merely to have the exact words available, rather than relying on his notes. *See Chemical Bank v. Kimmel,* 68 F.R.D. 679 (D.Del. 1975); *Mercon Corp, Inc. v. Goodyear Tire & Rubber Co.*, 57 F.R.D. 506 (D. Minn. 1972).

The plaintiffs' costs for the trial transcripts were not "necessarily obtained for use in the case," and this court does not consider them as costs taxable to the defendant.

C. Witness Fees.

Plaintiffs have listed as taxable costs, witness attendance and subsistence fees. The plaintiffs have also listed transportation expenses for witnesses' airfare. These fees, provided for under 28 U.S.C. §1821, are taxable pursuant to 28 U.S.C. § 1920(3).

1. Witness Attendance Fees.

28 U.S.C. 1821(b) states that:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time

necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

The court is satisfied that the request for witness attendance fees is reasonable. The witnesses from the mainland were paid $30 for each day of testimony, and for days spent traveling to and from Hawaii. The local witnesses attendance fees are also proper under the section 1821(b) Therefore, witness attendance fees will be taxed in the amount of $600.00.

2. Witness Subsistence Fees.

28 U.S.C. § 1821(d) states in pertinent part:

> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day. * * *
>
> (2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5 for offical travel in the area of attendance by employees of the Federal Government.

The court is satisfied that a $75 per diem, the maximum allowed under 5 U.S.C. 5702, is a reasonable per diem for witnesses traveling to Hawaii. Therefore, the subsistence fees are taxable in the total amount of $1125.00.

3. Travel Expenses.

The clerk also taxed various amounts for witnesses' air fare to Hawaii from New York, West Virginia, Washington D. C., and Portland. Defendant objects to these expenses on two grounds: 1) the courts normally do not allow for taxation of travel expenses beyond the 100-mile limit of the

court's civil subpoena power; and 2) the plaintiffs did not adequately document the actual expenses of the air fare or the reasonability thereof.

28 U.S.C. § 1821(c)(1) states:

> A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. *Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.* [emphasis added]

The traditional rule with regard to witnesses' travel expenses was that travel expenses would only be awarded for witnesses' travel within the 100-mile limit of the court's subpoena power. However, it is within the court's discretion to deviate from that traditional rule, *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 232 (1964), and the Ninth Circuit has expressly held that the district court may award costs of travel from beyond the 100 mile limit. *Moylan v. AMF Overseas Corporation,* 354 F.2d 825, 829-30 (9th Cir. 1965). Given the fact that the District of Hawaii is not located within the continental United States, it would be not only totally unreasonable, but also physically impossible that any witnesses from the mainland—a distance of more than 2000 miles—could ever be brought to this district without exceeding the 100-mile limit advocated by defendant. Therefore, the court is satisfied that the plaintiffs are entitled to an economically reasonable amount for transportation of witnesses from the mainland.

The remaining issue is the taxable amount of the transportation costs. Section 1821, as cited above, requires that the witness provide a receipt for actual expenses, and that a showing be made that the fare used was "at the most

economical rate reasonably available." The plaintiffs have failed to comply with either of these statutory requirements. In this case, the defendant has filed an affidavit to the effect that the plaintiffs' expert witnesses could have availed themselves of fares in the following amounts in August of 1983:

West Virginia/Honolulu/West Virgina	$ 820.00
Albany/Honolulu/Albany	689.00
Washington/Honolulu/Washington	689.00
Portland/Honolulu/Portland	458.00
	$2656.00

This court notes that the plaintiffs have actually listed the cost of Mr. DeMille's airfare from Portland at $438.00. Therefore, in the absence of any documentation from the plaintiffs as to the necessity of obtaining the more expensive fares, this court will allow taxation of costs in the amount of $2636.00 for transportation of plaintiffs' witnesses from the mainland.

D. Fees for Exemplification and Copies of Papers.

28 U.S.C. § 1920(4) states:

> A judge or clerk of any court of the United States may tax as costs. . .
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use at trial.

Plaintiffs' Bill of Costs included the amount of $2,519.22 for copying and the cost for creating demonstrative evidence, such as photographs and graphs. The clerk taxed all of these costs, except $1,448.70 for "office xerox expenses."

The clerk was correct in declining to tax costs for plaintiffs' office copying expenses. The plaintiffs did not make a satisfactory showing that this copying was "necessarily obtained for use in the case." Plaintiffs' counsel admits that he reached this amount by halving the total xeroxing expenses

incurred by his office "in connection with the case." This method of computing the taxable cost of copying is insufficient to meet the statutory standard.

The copying of the documents from the United States Treasury to obtain Genetti's report *do* meet the statutory standard, however, since the information was necessary to plaintiffs' case at trial.

The copying of documents in the possession of the Salinas County Superior Court Clerk's Office do not meet the statutory requirements. There is no evidence that even if Mr. Aguilar had been permitted to testify at trial, that these documents would have been useful in any way. The documents were obtained as part of the plaintiffs' investigation of the "Aguilar incident." Absent a stronger showing of how these documents assisted the trial of the case, or even the pretrial proceedings, the costs of copying are not taxable.

The costs of photographs, charts and the atomic simulator mock-up are taxable if these items somehow assisted the trier-of-fact. The plaintiffs must provide documentaion of its claim that all of the expenses went toward items used at trial as demonstrative evidence.

E. Deposition Costs.

1. Costs Incident to Taking Depositions.

The plaintiffs' Bill of Costs included $5,908.29 for "costs incident to taking of depositions." Although section 1920 does not specifically provide for taxation of costs of taking depositions, it is within the court's discretion to award them when it appears that the deposition was reasonably necessary for use in the case. Such costs may be reasonably necessary for use in the case, even though the deposition is not used at trial at all, when for example the deposition is used in pretrial motions or the issue is eliminated from contest at the pretrial stage. Where, however, the costs of the deposition amount to no more than investigation or preparation costs

-- however meritorious -- the costs are not taxable. 6A *Moore's Federal Practice* ¶ 54.77[4].

The court notes first that the defendant has made no objections to the taxation of costs for the depositions of Moerls, Harren, Dappert, Masuk, Hernandez, Green, Sakaruda, Acosta or Wada. These costs will therefore be allowed in the amount of $953.68.

Some of the defendant's objections to specific deposition items are well-taken. The defendant objects to the taxation of costs for deposition transcript copies of the deposition of plaintiffs' witnesses who later testified at trial. The transcript copies ordered by plaintiffs were ordered for their convenience and served no "reasonably necessary" purpose in the case or the trial. Therefore, the deposition costs for William Fitzgerald, Wallace Strickler, Edward De Mille, Glenn White, Albert Genetti, Dr. Peter Barcia, Lewis Freitas, and Dr. McNamara are not taxable. Similarly, the transcript copies of Perry and Annabelle Jenkins' deposition are not taxable, because the Jenkinses were parties to the litigation, as well as witnesses at trial.

The plaintiffs' Bill of Costs also includes the costs of taking John Aguilar's deposition. Aguilar was to be called as a witness at trial, but his testimony was excluded by a pretrial ruling of the court. If Aguilar had testified as a live witness, the costs of his deposition would not be taxable for the same reason that other live witnesses testimony would not be taxable. Plaintiffs contend that the deposition was prompted by defendant's motion *in limine* to exclude the testimony. Plaintiffs do not provide any further explanation as to why the deposition was reasonably necessary for use at trial, or for use in their unsuccessful opposition to the motion. Therefore, the court is not satisfied that the costs of Aguilar's deposition is taxable.

The plaintiffs have also asked for costs of transcript copies of their experts' depositions. Both of these depositions were used in the case. Lizza's deposition transcript was marked as an exhibit, even though it was ultimately excluded at trial

for lack of foundation. Brower's deposition was used by both sides in various motions for summary judgment. Therefore, these expenses are taxable in the amount of $151.00.

The costs of taking the depositions of defendant's experts and other witnesses were "reasonably necessary" for use in the case. The depositions were necessary to allow the plaintiffs to prepare for potential trial testimony of Jacobsen, Calkins, and LoFiego, even though one of them ultimately failed to testify. These costs are therefore taxable in the amount of $1313.25. As to the "appearance fee," it is unclear who or what this fee applies to, therefore it will be disallowed.

Plaintiffs have also included the cost of a transcript of Fred Labudzinski's deposition. Apparently, Whittaker sought to have Labudzinski's deposition introduced into evidence. Therefore, plaintiffs' copy of the depositions transcript was "reasonably necessary" for use at trial, even though the deposition was eventually excluded from evidence, and costs will be taxed in the amount of $222.00

F. Other Costs

1. State Court Filing Fees.

Plaintiffs have listed under "other costs" filing fees for the First Circuit Court action which was eventually removed to federal court. The plaintiffs have already recovered the filing fees for the complaint filed in federal court under part A above. Therefore, this court will disallow the additional costs expended by the plaintiffs in filing a nearly identical claim in state court.

2. Deposition Docket Fees.

28 U.S.C. § 1920 provides for taxation of deposition docket fees provided for under § 1923. Section 1923 provides for $2.50 for each deposition "admitted in evidence."

This section has been construed liberally to permit taxation of docket fees where the deposition was reasonably necessary for use at trial. 6 *Moore's Federal Practice* ¶ 54.77[4] n. 4.

The standard appears to be analogous to that used to determine the taxability of other deposition costs. Therefore, docket fees will be taxed for those depositions for which the court is taxing other costs incident to taking depositions, as discussed above.

Accordingly, IT IS ORDERED that costs will be taxed in a manner and in amounts consistent with the foregoing analysis, and that plaintiffs shall provide the required documentation.

III. PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST.

Plaintiffs have moved for an award of prejudgment interest. Plaintiffs present a two-part argument: 1) under Hawaii law, an award of prejudgment interest is permitted to compensate for the defendant's use of money owing to the plaintiffs from the time of injury; and 2) the award is warranted because of the defendant's resistance to resolution of the case prior to and during trial. Defendant opposes an award of prejudgment interest on the grounds that it was not proven at trial as an element of compensatory damages.

Both parties rely on *McKeague v. Talbert,* 3 Haw. App. 646 (1983) as the controlling state precedent in the area of prejudgment interest in tort damage cases. *McKeague* states in part:

> Since [*Honolulu v.*] *Caetano* and *Lucase* [*v. Liggett & Myers Tobacco Co.*], then, it appears that the rule in this jurisdiction has been that prejudgment interest is recoverable as an element of damages from the date of injury, even if unliquidated at that time. The plaintiff must prove that damage, however, and recovery would be subject to any defenses that defendant might raise.

McKeague at 661-62 (citations omitted in text).

This court is bound under *Erie v. Tompkins* to follow the law of the state of Hawaii in this case. Under Hawaii law,

the available precedent recognizes prejudgment interest as an element of compensatory damages. *See McKeague v. Talbert, supra; Honolulu v. Caetano,* 30 Hawaii 1 (1927); *Lucas v. Liggett and Myers Tobacco Co.,* 51 Hawaii 346, 461 P.2d 140 (1969). Unnecessary delay and resistance to resolution of this case are not prerequisites to an award of prejudgment interest. *McKeague* at 663.

Nonetheless, as this court reads the language of *McKeague*, the plaintiffs in this case are not entitled to an award of pre-judgment interest at this time. As the language from *McKeague* indicates, under Hawaii law, a successful party must prove prejudgment interest as an element of compensatory damages *at trial.* The plaintiffs failed to do so in this case, and the jury did not award any interest on the amount of the verdict.

The plaintiffs are asking this court to amend the judgment to add an element of compensatory damages for which no evidence was presented to the jury. Plaintiffs claim that this court has authority to do so under Rules 59 and 60 of the Federal Rules of Civil Procedure.

As defendant notes, plaintiffs' motion is untimely under Rule 59. In addition, Rule 60 is not applicable in this case. Clearly, the award of prejudgment interest was not omitted because of a clerical error, which would be excusable under 60(a). Plaintiffs argue further that this court has discretion to relieve a party of a final judgment for mistake, or excusable neglect under Rule 60(b). The court finds that in this case, where the plaintiffs seek to have the court instate an element of damages never proven at trial, the plaintiffs are not entitled to relief from the final judgment entered in this case under Rule 60(b).

Accordingly, the Motion for Award of Prejudgment Interest is DENIED.

IV. CONCLUSION.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's Motion for Judgment Notwithstanding the Verdict or Alternatively for a New Trial is DENIED;

IT IS FURTHER ORDERED that the defendant's Motion to Review Costs is GRANTED in part and DENIED in part;

IT IS ALSO FURTHER ORDERED that the plaintiff's Motion for Award of Prejudgment Interest is DENIED.

DATED: Honolulu, Hawaii, APRIL 20, 1984.

Harold M. Ezra

UNITED STATES DISTRICT JUDGE

Civ.Nos. 80-195, 80-263; *Jenkins, et al. v. Whittaker Corp., et al.*; ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL, ORDER REGARDING MOTION TO REVIEW TAXATION OF COSTS AND ORDER DENYING MOTION FOR PREJUDGMENT INTEREST.

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Whittaker Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

PERRY D. JENKINS, ANNA-)
BELLE JENKINS, and STUART)

APPENDIX D

A. KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, a California corporation, Defendants.	) CIVIL NO. 80-0195) ORDER DENYING) PLAINTIFFS') MOTION FOR) RECONSIDERATION) OR ORDER DATED) APRIL 20,) 1984 DENYING) REQUEST FOR) PREJUDGMENT) INTEREST (Consolidated)
PERRY D. JENKINS, ANNABELLE JENKINS, and STUART A. KANEKO, as Special Administrator of the Estate of Jeffrey Scott Jenkins, Deceased, Plaintiffs, vs. WHITTAKER CORPORATION, dba Bermite Corporation, a Division of Whittaker Corporation, JOHN DOES 1-10, DOE CORPORATIONS 1-10, and DOE PARTNERSHIPS 1-10, Defendants.	) CIVIL NO. 80-0263

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DATED APRIL 20, 1984 DENYING REQUEST FOR PREJUDGMENT INTEREST

On February 28, 1985 the Plaintiffs' motion for reconsideration of the April 20, 1984 order of this Court denying Plaintiffs' original motion for prejudgment interest came on regularly for hearing before this Court. Plaintiffs appeared by and through their counsel of record, John D. Thomas,

Jr. Defendant appeared by and through its counsel of record, Ronald M. Greenberg and Jerold T. Matayoshi. The Court having considered the pleadings filed in connection with this motion, and the record and files herein, and having heard oral argument and being fully advised in the premises, rules as follows:

IT IS HEREBY ORDERED that Plaintiffs' motion for reconsideration is denied on the ground that the Court is without jurisdiction to consider awarding prejudgment interest to Plaintiffs in view of the fact that Plaintiffs' original request for prejudgment interest was not filed within the time specified in Rule 59(e), Federal Rules of Civil Procedure, and upon the further ground that Federal Rules of Civil Procedure 60(a), 60(b)(1) and 60(b)(6) are inapplicable herein.

DATED: Honolulu, Hawaii, MAR 18 1985

HAROLD M. FONG

Judge of the above-entitled Court

APPROVED AS TO FORM:

JOHN D. THOMAS, JR.

JOHN D. THOMAS, JR.

Attorney for Plaintiffs

Jenkins, et al. v. Whittaker Corp., et al.; Civil Nos. 80-0195 and 80-0263, Order Denying Plaintiffs' Motion for Reconsideration of Order Dated April 20, 1984 Denying Request for Prejudgment Interest

AUG 18 1978

Mr. Labudzinski/ks
880-3056

DRSARIMAD-C

SUBJECT: Malfunction Investigation of Simulator, Atomic Explosion, M142 (MIF-A-45-78) - Hangfire

Commander
US Army Armament Materiel
Readiness Command
ATTN: DRSAR-QAS
Rock Island, Illinois 61299

1. During training exercises at Fort Shafter, Hawaii, on 12 May 1978, a malfunction occurred and resulted in a fatal injury to a member of the 1st Bn, 14th Infantry Division.

2. An on-site investigation was conducted by Maintenance Engineering personnel. The following account of the incident was obtained:

Two simulators were unpacked and prepared for functioning as a part of a familiarity exercise. Two firing wires, approximately 300-400 feet, were attached to the 150 foot wire enclosed in the simulator. An M32 Blasting Machine was used to detonate the 1st simulator. The 1st simulator reportedly functioned normally. The 2nd set of wires leading to the 2nd simulator were attached to the same blasting machine. Approximately 10 attempts were made to function the 2nd unit without success. After waiting 15 minutes, 3 troopers approached the 2nd unit to shunt the wires (alligator clips). The same 3 troopers then walked towards the 1st unit to retrieve the firing wire to use it to detonate the 2nd unit. The wires to the 1st unit were shunted. The soldier who was fatally injured, was in the process of walking around the drum of the expended unit with the firing wire in hand when a second explosion occurred in the immediate area of the reportedly expended simulator.

3. Several deviations from recommended procedure by the operators were noted:

a. The operators of the firing operations did not wait 30 minutes before approaching the second or misfired simulator.

b. An M32 Blasting Machine, which is not authorized by applicable TMs, was used to fire the simulator rather than 12 or 24 volt, fully charged battery.

c. Firing wire was spliced to the alligator clips and extended to the firing site. The use of additional firing wire is also not authorized with this item.

4. As a result of the above, the pocket-size operators manual, TM 9-1370-207-10, covering the M142 Simulator has been reviewed. Although the above TM is considered adequate for the safe unpacking and functioning of the subject simulator, changes to include specific restrictions, (i.e., blasting machines and extension wires) are scheduled.

5. The steel drum from the first simulator was inspected by Maintenance Engineering personnel and it was noted that the exterior surface of the drum was greatly discolored. Discussion with ARRADCOM indicated that discoloration of the exterior surface of the steel drum is in no way unusual, and this need not imply unauthorized practices.

6. Upon evaluation of the on-site investigation results, it is concluded that the second explosion in the immediate area of the first or expended unit causing the fatality, was the result of an unexploded demolition item. The possibility of a subsequent detonation of a misfired sound unit is considered remote. The account of the first detonation, given by witnesses having previously experienced the functioning of an Atomic Blast Simulator, would indicate that both the smoke and sound unit had detonated normally.

7. Based on the above, it is considered that ammunition lot BER-2-4 functioned satisfactorily. Therefore, it is recommended that the involved lot be released for further issue and use.

8. Disposition recommendations pertaining to this malfunction are considered finalized and Malfunction File A-45-78 (Incl 1) is being returned for appropriate action.

FOR THE COMMANDER:

1 Incl
as

Cy Furn:
DRSAR-MAD
DRSAR-LE

CONCURRENCE:
ARRADCOM _____ DRDAR-LCU-E

_____ DRDAR-QAA-Q

Engineer _____
Proj Leader _____
Br Chief _____

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY SUPPORT COMMAND, HAWAII
FORT SHAFTER, HAWAII 96858
DIRECTORATE OF INDUSTRIAL OPERATIONS
PLANS AND OPERATIONS OFFICE

AFZV-DI-PO

MEMORANDUM FOR DIO

SUBJECT: Malfunction/Accident Investigation at Pohakuloa Training Area (PTA)

1. During the afternoon of 11 May 78, an accident occurred at the Pohakuloa Training Area (PTA) resulting in a fatal injury to a soldier assigned to the 65th Engineer Battalion. I was formally notified during the evening of 11 May 78 by the DAO who requested that I go to PTA and investigate the accident. I departed Honolulu on Aloha Flight #340 at approximately 0800 the morning of 12 May 78. I was greeted by SFC Anderson, Range Safety NCOIC, who provided transportation to PTA. Major Moerls, Cdr of 6th EOD, and one of his specialists who arrived at PTA on 11 May 78 also rode up the hill with us.

2. Upon arrival at PTA I was introduced to Daryl Neil, a military police investigator. He informed me that he wanted a statement of my findings before I left. SFC Anderson showed me on the training maps where the accident occurred, and also told me that they had not issued range clearance for firing an atomic simulator.

3. At approximately 1130 transportation was arranged and we left by chopper the the training site where the accident happened. Following personnel were contacted.

LTC Vichers, Cdr 1/14
CPT Fritzgerald, Cdr, Co "C", 1/14
MAJ Moerls, Cdr, 6th EOD
Daryl Neil, MPI

4. Following observations were made at the training site where the accident occurred:

a. Three CONEX containers are located near road net that service the firing site. CONEX's are used as a barricade and storage area for equipment and munitions. CONEX's are shielded in the front and side toward the firing point with a variety of ammunition boxes. Some boxes are filled with dirt and gravel, some are empty. Each CONEX is separated about three feet. Electrical firing wire is located between first and second CONEX and it is here that electrical initiation is made. These CONEX containers are located approximately 550 feet from the firing site.

b. The drum from the fired atomic simulator was pointed out to me by CPT Fritzgferald. CPT Fritzgerald was the OIC of the firing and was in the near proximity of the soldier that was fatally injured. Before anyone went near the accident site, CPT Fritzgerald attempted to explain what happened. Based on his input, MAJ Moerls and myself decided it was safe to proceed to the accident site. Before walking down to the site, I couldn't help but observe the dark or burned coloration of the drum. I have observed and participated in firing atomic simulators in the past. Under normal firing conditions, the drum does not experience sufficient heat to cause discoloration of the white point.

c. Upon arrival at the accident site, the fired drums condition was verified. In my opinion, this drum was subjected to excessive heat on the outside of the drum.

d. The firing site near where the accident happened contained loose rocks over the whole area.

e. The area around the fired drum and especially out to 14 feet downwind was void of any earth disturbance normally expected after firing of the sound charge. CPT Fritzgerald could not explain this situation. The 150 foot and 14 foot firing wires were noted to be laying in a heap near the drum. The wires were not uncoiled and extended to or anywhere near their full length. The separator that covers the smoke charges in the drum was found about 50 feet from the drum in the brush. During normal firing, this separator is found near the drum with the 150 foot and 14 foot wires intact. The 150 foot cable was spliced to a rather long piece of wire which was in turn connected to the firing wire from the barricade. It was noted that the wire was caught behind a large rock and it looked like the wire was being stretched. The end of this stretched wire was near where the accident victim appeared to have fallen and was treated.

f. Close examination of the coiled up wires indicates that live igniters are still attached to the ends of the 14 foot wires normally terminating inside the sound unit. This will be verified when the wires are inspected by the Picatinny Arsenal representative. These wires have been recovered and are available.

g. CPT Fritzgerald stated that firing was conducted by using an M32 blasting machine. Operating instructions specifically state that a fully charged 12 or 24 volt automotive type battery will be used. No other electrical firing source, other than a battery, is authorized.

h. I asked CPT Fritzgerald what procedures he followed in setting up and firing an atomic simulator. I asked if he had an SOP or checklist. He told me he had no procedures and that he set them up and fired them like he was taught in demolition school a few years ago.

5. Following conditions were noted near a second atomic simulator that was partially set up and within 50 feet of the accident site:

a. The sound unit was laying on the ground with the 14 foot wire fully extended downwind. Near the sound unit were several rocks which would cause high velocity fragments.

b. The smoke charges were inside the drum and the separator was in place.

c. The 150 foot cable was laying on the ground mostly coiled as it would be upon removal from the drum. The wires were shunted as both alligator clips were clipped together.

d. This unit at the time of my inspection had been unpackaged for over 26 hours and the sound unit was laying on the ground.

e. With LTC Vichers permission, MAJ Moerls and myself unwound the 150 foot cable in an upwind direction and continually checked the wire. I cleared all the commo wire from the firing that came from the barricade. A continuity check was made of this wire and I verified the ends were shunted at the barricade. MAJ Moerls connected the wires and then came to the barricade. CPT Fritzgerald wanted us to fire the simulator using the M32 blasting machine. I informed him we'd use an automotive type battery. He directed one of his troops to remove a battery from a Gama Goat nearby. I wanted to compare the condition of the two drums after what I considered a normal firing. MAJ Moerls fired the simulator after it was set up IAW TM 9-1370-203-12. The simulator, Lot No. PXC-1-64, fired in what I considered a normal manner. The sound and flash charge produced a bright flash and a loud report. The smoke charge was mushroom-shaped and dissipated quickly due to gusty winds.

f. We waited 30 minutes after the firing and then proceeded to the firing point. LTC Vichers, CPT Fritzgerald, Mr. Neil and MAJ Moerls commented on the condition of the drum. The paint was hardly affected by the ignited smoke charges. The separator complete with wires was found about three feet downwind from the drum and thedrum had sustained two sizeable perforations from the detonation of the sound charge. During the inspection of this unit prior to the detonation, it was noted that several rocks were within 18 inches of the sound unit. It is believed these rocks were blown apart by the sound charge and the flying fragments caused the holes in the drum. I have taken pictures of this situation and they will clearly depict tis.

g. I asked CPT Fritzgerald how he could explain the difference between the condition of the two drums with reference to the condition of the outer paint. He could not explain it.

6. Following shortcomings were in evidence concerning the firing of a Simulator, Atomic Explosion: M142:

a. Firing site does not afford an area free of loose rocks above the ground.

b. Set up crew failed to unwind and extend electric cable to its full length (150 feet) in an upwind direction.

c. Firing of the simulator was by an M32 blasting machine rather than connecting both lead wires from the firing wire to a power source (either a 12 or 24 volt, fully charged, automobile-type battery).

d. It is questionable if the personnel that were in the near vicinity of the accident site waited at least 30 minutes before approaching the simulator.

e. Misfire procedures spelled out in paragraph 2-15b(1), (2), and (3) of TM 9-1370-203-12, were not followed.

f. Commo wire was spliced between the firing wire and the coiled 150 foot cable. No where in any of the user manuals does it authorize commo wire to be used as firing wire.

g. Range control was not aware that an Atomic Simulator was to be fired on the day of the accident.

h. The location of cardboard separator was not the same as the coiled wires. This is not normal. The separator showed evidence that the wires were removed and the separator was discarded in the brush area behind the accident site.

7. In view of the shortcomings noted above and the general condition of the fired drum near the accident site, the following conclusions are made:

a. Unauthorized operations were performed prior to and at the time of the accident.

b. The ammunition as issued was serviceable and if set up correctly, it should have functioned correctly.

Glenn A. White

GLENN A. WHITE
Chief, Ammo Surv Ofc

CF:
DPTINT, ATTN: Tng Div
CAMO-PAC
Cdr, 25th Inf Div, ATTN: AFVG-PAS (CW3 Smith)
DPCA, ATTN: Safety Div
DAO

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2264

Delbert Boyle, personal representative of the Heirs and Estate of David A. Boyle, deceased,

Appellee,

versus

United Technologies Corporation,

Appellant,

and

Sikorsky Aircraft,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge. (C/A 84-486).

Argued: March 6, 1986 Decided: May 27, 1986

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Lewis T. Booker (Lonnie D. Nunley, III; Hunton & Williams on brief) for Appellant; Louis S. Franecke (Mack, Hazlewood, Franecke & Tinney; James E. Moore; Staples, Greenberg, Minardi & Kessler on brief for Appellee).

APPENDIX G

PER CURIAM:

David Boyle drowned after the Marine helicopter he was flying crashed in the Atlantic Ocean. Boyle's father, Delbert Boyle, on behalf of himself, Boyle's mother and three sisters, sued the Sikorsky Division of United Technologies Corporation (hereinafter "Sikorsky"), the manufacturer of the helicopter. Boyle alleged negligence and breach of warranty in the design of the co-pilot's escape hatch and the rework of the helicopter's control system.

The jury found for plaintiffs. Sikorsky moved for a judgment notwithstanding the verdict, arguing that the military contractor defense shielded it from liability for the alleged design defect, and that plaintiffs had failed to establish Sikorsky's responsibility for the malfunction of the control system. The district judge denied Sikorsky's motion.

We reverse and remand with directions to enter judgment for defendant.

I.

On April 27, 1983, a Marine helicopter manufactured by Sikorsky (a CH-53) crashed in the ocean off the coast of Virginia Beach. The four crew members survived the impact. Three of them escaped through emergency exits, but the co-pilot, David Boyle, did not escape, and drowned.

At trial, plaintiffs attempted to show that Sikorsky had defectively repaired the pilot valve of the helicopter's servo. The servo acts as a sort of power steering to assist the pilot in flying the plane. After the accident, a small chip of wire was found in the pilot valve. Plaintiffs argued that the chip caused the servo to stop functioning, the pilot lost control of the helicopter, and the helicopter crashed into the water.

The metal chip could have been introduced at one of three times: when Sikorsky overhauled the helicopter in late 1981 -- early 1982; when the Navy reworked it in late 1982; or during maintenance of the hydraulic system by the Marines. The parties agree that it is least likely that the servo was

contaminated during maintenance. Plaintiffs contended at trial that the chip was most likely introduced by Sikorsky.

Plaintiffs also contended that Sikorsky had defectively designed the co-pilot's escape hatch. Specifically, plaintiffs alleged that when the collective, one of the control sticks, was pulled full up, it interfered with the co-pilot's access to his escape hatch.

The jury, in a general verdict, found for plaintiffs and awarded them $725,000. Because we believe the military contract defense precludes any recovery for the design defect, and because there was insufficient evidence to conclude that Sikorsky was the party that introduced the chip, we reverse the decision below.

II.

A military contractor can escape liability for a design defect if it can demonstrate that 1) the United States is immune from liability; 2) the United States approved reasonably precise specifications for the equipment; 3) the equipment conformed to those specifications; and 4) the supplier warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. *Tozer v. LTV Corp.*, No. 84-1907, slip op. (4th Cir. ___ 1986).*

Sikorsky and the Navy worked together to prepare detailed specifications for the CH-53 helicopter. One of Sikorsky's program engineering managers for the CH-53 described in some detail the back-and-forth discussions between Sikorsky and the Navy. We have previously said that this type of exchange of information will normally suffice to establish government approval of the design in question. *See Tozer,* slip op. at 13. In addition, Sikorsky built a mock-up of the cockpit with all the instruments and controls, including the

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* *Tozer* and its companion cases have all involved isolated incidents in the course of training exercises. We obviously have no occasion to address the governing considerations at a time of national emergency.

collective stick and the emergency escape hatch. The Navy reviewed the mock-up and approved the design. As a result, Sikorsky has adequately demonstrated that the Navy approved reasonably detailed specifications for the escape hatch.

Sikorsky then built the helicopter, and in 1970 the Navy accepted it as fully complying with specifications. The Navy thus had thirteen years of experience with this particular helicopter at the time of Boyle's crash. Plaintiffs point to nothing in the record that indicates there were any hazards of which Sikorsky was aware and the Navy was not. Sikorsky's duty to warn the Navy of any hazards known to it but not to the Navy was thus not brought into question.

Because Sikorsky has satisfied the requirements of the military contractor defense, it can incur no liability for negligence or breach of warranty for the allegedly defective design of the escape hatch.

III.

We need not consider in this case the applicability of the military contractor defense to questions of manufacture and overhaul, because Sikorsky's liability can in no event be established. Even if the metal chip were the cause of Boyle's accident, plaintiffs must still show that defendant's defective rework introduced the chip, for the law of products liability in Virginia does not permit recovery where responsibility is conjectural. *Logan v. Montgomery Ward & Co., Inc.*, 219 S.E.2d 685 (Va. 1975).

Plaintiffs have failed to do more than speculate that Sikorsky introduced the metal chip into the pilot valve of the servo. It is true that when Sikorsky reworked the helicopter in late 1981 -- early 1982, it disassembled the servo. After the rework was complete, Sikorsky put a tamper seal of yellow paint on the valve. The yellow paint was undisturbed, suggesting that no one had removed the valve since the Sikorsky rework. However, when the Navy repaired the servo in late 1982, it removed the power piston, exposing the

hydraulic system to contaminants, and creating the substantial possibility that when the piston was returned to the servo, the chip got into the valve from the unsealed underside.

The chip was made of carbon steel. The manager of product safety at Sikorsky testified that Sikorsky used only stainless steel, in order to prevent corrosion, and that it had no carbon steel in its inventory. Plaintiffs argued that the size of carbon wire that formed the chip was so common that it would not have been listed in Sikorsky's inventory. Plaintiffs also introduced a Navy audit which said that wire of the type and size of the chip found in the servo was not used in the rework shop at the Pensacola Naval Air Rework facility. In response, a Sikorsky representative at Pensacola testified that the Navy did have carbon steel in its inventory from at least July of 1982.

It remained plaintiffs' burden to prove that Sikorsky was responsible for the introduction of the chip into the pilot valve of the servo. Virginia products liability law is assiduous in conditioning liability upon responsibility. "Under either the warranty theory or the negligence theory the plaintiff must show . . . that the unreasonably dangerous condition existed when the goods left the defendant's hands." *Logan v. Montgomery Ward,* 219 S.E.2d at 687 (Va. 1975). It is well established that if there is more than one possible cause of an injury, the plaintiff must show that the defendant caused the injury:

> When there is substantial evidence introduced which tends to prove that plaintiff's injuries may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, such defendant is entitled to have the jury told that the plaintiff must fail if his evidence does not prove that his damages were produced by the negligence of defendant; and he must also fail if it appears from the evidence just as probable that damages were caused by one

as by the other because the plaintiff must make out his case by a preponderance of the evidence.

Cape Charles Flying Service, Inc. v. Nottingham, 47 S.E.2d 540, 544 (Va. 1948). *See also, Spurlin v. Richardson,* 128 S.E.2d 273, 277 (Va. 1962); *Sneed v. Sneed,* 244 S.E.2d 754, 755 (Va. 1978).

"The evidence in the instant case fails to eliminate the possibility that the blame attaches to some party other than" Sikorsky. *See Logan v. Montgomery Ward,* 219 S.E.2d at 688. Both Sikorsky and the Navy reworked the servo to an extent that would have permitted the chip to enter the pilot valve. Sikorsky and Boyle presented conflicting evidence on the presence of carbon steel in the rework shops at Sikorsky and Pensacola. "The evidence must prove more than a probability of negligence. A plaintiff must show why and how the incident happened. And if the cause of the event is left to conjecture, guess, or random judgment, the plaintiff cannot recover." *Town of West Point v. Evans,* 299 S.E.2d 349, 351 (Va. 1983). Defective rework by Sikorsky is by no means "the only reasonable inference that can be drawn to explain" the presence of the chip. *Logan v. Montgomery Ward,* 219 S.E.2d at 688. In *Logan*, the Virginia Supreme Court declined to permit a jury to speculate whether defective manufacture or defective installation caused a gas range to explode. Here also, a defendant whose responsibility is not affixed with reasonable certainty is entitled to judgment as a matter of Virginia law.

REVERSED

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 23, 1986, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Paul F. Cronin, Esq.
John D. Thomas, R.J., Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 23, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

No. 85-2115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WHITTAKER CORPORATION,
Petitioner,

VS.

PERRY D. JENKINS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' COUNTERSTATEMENT OF THE CASE

On May 11, 1978, while taking part in a demolitions demonstration at a military training ground at Pohakuloa on the Island of Hawaii, Specialist Four Jeffrey Jenkins of the 65th Engineer Battalion was fatally injured when an M-142 atomic simulator that had already been detonated once exploded a second time while he was nearby. The simulator is basically a 55-gallon steel drum into which explosive powder charges have been packed which, when detonated, will simulate the visual and aural effects of a nuclear blast on the ground.

Two simulators were scheduled to be detonated as part of the morning's training exercises. The first, made by Petitioner Whittaker Corporation (hereinafter "Whittaker"), had detonated routinely. The second one, made by a different company, failed to detonate on the first attempt. Some fifteen to thirty minutes had

elapsed from the time the first simulator had exploded when Jenkins, together with two senior officers, approached the Whittaker simulator to transfer its ignition wires, which had functioned properly earlier, to the second simulator. Although heat waves and flames could still be seen rising from the barrel, the officers did not foresee any danger because they had observed a normal detonation of that simulator, nearly half an hour had gone by, and they expected debris in the bottom of the barrel to continue to burn. While he was transferring the ignition wires from the first simulator to the second, Jenkins and the two officers with him were lifted off their feet and thrown back by the force of a blast which numerous eyewitnesses said came from the burning barrel of the first simulator. Jenkins, twenty years old, died from his injuries later that evening at Tripler Army Hospital in Honolulu.

His parents and his estate brought suit against petitioner Whittaker in Hawaii. They contended that the simulator had been defectively designed and manufactured, and presented claims against Whittaker based on strict liability, breach of warranty, and negligence. Following trial in the United States District Court, the jury returned a verdict upon special interrogatories, pursuant to which it found no defect in the design of the simulator, but a defect in its manufacture. The jury also found that Whittaker had breached warranties and had been negligent, and awarded damages in the total amount of $300,000. Judgment was entered on August 29, 1983. Ten days later, Whittaker moved for judgment n. o. v. or in the alternative for a new trial. On September 30, 1983, plaintiffs filed a motion for award of prejudgment interest pursuant to Haw. Rev. Stat. § 636-16 (Supp. 1984)[1] and Rule 7 of the Federal Rules of Civil Procedure.

The court subsequently denied all of the motions. Following various procedural steps under which it twice reconsidered re-

[1] This statute reads as follows: "In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred."

spondents' motion for prejudgment interest, the court finally ruled that it was unable to grant the motion because it had been filed outside the ten-day period permitted by Rule 59(e) for alteration or amendment of a judgment. Whittaker appealed, and respondents cross-appealed.

Whittaker's brief on appeal presented ten questions for review, ranging from in personam jurisdiction and choice of law to rulings on the exclusion of evidence. (*See* Appendix A-5 through A-7, *infra*, for a copy of the Table of Contents of Whittaker's opening brief on appeal.) Whittaker did not argue on appeal that it was immune from liability because of its status as a military contractor, however. (Nor had Whittaker presented this defense in the district court. [*See* Appendix A-1—A-4, *infra*, for a copy of the answer filed by Whittaker to the complaint.] At trial, Whittaker had asked for and received an instruction to the jury that it could not be liable for a design defect in the simulator if the jury found that the government had specified and approved the design, that Whittaker had produced the simulator in accordance with specifications, and that Whittaker had communicated fully to the government all concerns it had about the safety of the design. As noted earlier, the jury specially found that there was no design defect in the simulator.)

The Ninth Circuit, in a thorough and carefully crafted opinion, considered and rejected each of Whittaker's grounds for appeal, and affirmed the jury verdict. On respondents' cross-appeal, and applying the holding of this Court in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 450-52 (1982), it held that Rule 59(e) did not apply to a first-time motion for prejudgment interest following entry of judgment, and that respondents' motion had been timely. Because the Hawaii statute involved called for an award of prejudgment interest in the discretion of the court (*see* n. 1, *supra*), it reversed the order denying respondents' motion and remanded the case to the district court for exercise of its discretion in deciding whether and for what period to award prejudgment interest.

REASONS FOR DENYING REVIEW

I

THE ISSUE OF A MILITARY CONTRACTOR'S IMMUNITY FROM LIABILITY FOR DEFECTIVE MANUFACTURE WAS NOT RAISED OR PASSED ON IN THE COURT BELOW, AND IS NOT AN ISSUE WORTHY OF CERTIORARI IN ANY EVENT

Petitioner Whittaker asks this court to grant certiorari to review what it calls "an important question of federal law"—whether military contractors should be immune from suit by servicemen injured in the course of duty. There are two significant problems with Whittaker's request: it did not raise or brief the immunity issue to the Ninth Circuit, which consequently did not rule on the question; and the issue is unworthy of certiorari in any event.

A. The Issue Was Not Briefed or Decided Below

This Court does not normally review questions raised for the first time in a petition for certiorari. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 146 n.1, and authorities cited (1970). Whittaker did not present any defense of immunity in its answer filed in the district court. (*See* Appendix A-1—A-4, *infra.*) It did get a jury instruction on the military contractor defense insofar as it applied to plaintiffs' claim of a design defect in the simulator, but then the jury found that there *was* no design defect, and instead held Whittaker liable for a manufacturing defect. At that point the whole immunity issue became moot, since the military contractor defense is not applicable to a claim of mismanufacture (*infra,* at 5-6). On appeal to the Ninth Circuit, Whittaker first sought and was refused permission to file an over-lengthy brief in order to raise ten questions which it considered essential to present to the Court of Appeal. When it subsequently shortened its brief to the required fifty pages, Whittaker still presented ten questions for review by the Ninth Circuit. However, the questions so briefed and argued did not include the issue of immunity which Whittaker now wants this Court to "review." (*See* Appendix A-5—A-7, *infra.*) Certiorari, therefore, should be denied for this reason. *Miree v. DeKalb County,* 433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap,* 426 U.S. 312, 316 n.3 (1976).

B. There is No Statutory or Other Policy Basis for Granting Immunity to Manufacturers of Defective Military Products

Whittaker's argument for certiorari on the issue of immunity for military contractors essentially is an argument that a manufacturer who fails to follow government specifications and assembles a defective weapon or other item for use by the military should be immunized from liability for resulting death or injury to a serviceman.

This argument has been made before (although not by Whittaker in this case). It has been rejected as wrong by each court to consider the matter. What the courts have found is that it is the fact that a product *fails to conform to specifications* that causes problems with military procurement—the government did not receive the product it had asked for and thought it was buying. Consequently, Whittaker's argument is not worthy of certiorari in this case.

The Eighth Circuit gave perhaps the most direct answer to the argument when it said, in a case involving death and personal injury from a prematurely exploding grenade:

> In making the grenade and its component parts the defendants knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces.[2]

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[2] Foster v. Day & Zimmermann, Inc., 502 F.2d 867, 871 (8th Cir. 1974). Subsequent decisions in *design* cases have each been careful to distinguish *Foster's* rule of liability for manufacturing defects. *E.g.,* Bynum v. FMC Corporation, 770 F.2d 556, 564 (5th Cir. 1985) ("*Bynum*"); Shaw v. Grumman Aerospace Corporation, 778 F.2d 736, 740, 745-46 (11th Cir. 1985), *application for cert. on other grounds pending* (1986) ("*Shaw*"). The court in *Foster* also followed a prior holding in Whitaker v. Harvell-Kilgore Corporation, 418 F.2d 1010, 1013-15 (5th Cir. 1969), that sovereign immunity did not extend to an independent contractor alleged to have manufactured defective weapons for the military. 502 F.2d at 873-75. The continuing validity of *Whitaker*

Since the holding in *Foster* just quoted, there has evolved a doctrine which has come to be known as the "government contractor defense" or "military contractor defense."[3] The defense provides a limited immunity to a military contractor in cases involving defects in the *design* of military products whose specifications have been rigidly controlled by the government because of a particular military need or application. The defense has no relevance in cases involving defects in the *manufacture* of military products: as an element of the defense, the contractor must prove that he *followed and complied* with military specifications. *E.g., Shaw,* 778 F.2d at 740, 744-46: *Bynum,* 770 F.2d at 564.

Whittaker's argument seeks to expand the military contractor defense from a limited exception in cases of liability for a government-dictated design to a general immunity in all cases of liability for both defective design *and* defective manufacture. In support of this position, Whittaker cites the rationale offered in *McKay v. Rockwell International Corporation,* 704 F.2d 444, 449 (9th Cir. 1983), another design defect case. The court in *McKay,* however, expressly distinguished its rationale as follows:

> We also note that the rule enunciated here does not relieve suppliers of military equipment of liability for defects in the manufacture of that equipment. To hold otherwise would remove the incentive from manufacturers to use all cost-justified means to conform to government specifications in the manufacture of military equipment.

704 F.2d at 451. *See also Foster,* 502 F.2d at 874 n.5 ("The government's specifications did not call for the defendants to assemble a defectively made grenade"), and cases cited *supra,* n.2.

Whittaker's reliance on *Feres v. United States,* 340 U.S. 135 (1950), and on *Stencel Aero Engineering Corp. v. United States,*

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has never since been questioned. *See, e.g., Bynum,* 770 F.2d at 564; *Shaw,* 778 F.2d at 740.

[3] *See, e.g.,* Boyle v. United Technologies Corporation, No. 85-2264 (4th Cir., May 27, 1986) (Appendix to Petition for Certiorari, at G1); *Shaw,* 738 F.2d at 740-46, and cases cited.

431 U.S. 666 (1977), is misplaced. In those cases, the Court held that imposing liability *on the government* would lead to an impairment of military discipline and to the second-guessing of military decisions by the courts. In contrast, holding a manufacturer responsible for his failure to follow military specifications does not lead to such a result. The manufacturer will always try to prove, as Whittaker did in the instant case, that it was free from fault, and that the accident happened due to negligence on the part of the government. The manufacturer's right to compel testimony may cause evidence to be given by members of the armed forces as to each others' actions, and the weighing of that evidence in the context of evaluating the manufacturer's liability, but the judgment, if any, will be against the manufacturer, and not against the goverment or the military. The "uniquely federal relationship" between the government and its soldiers, which was cited in *Feres* and *Stencel,* is not threatened where the court's judgment cannot bind the military, or make it change its standards or behavior. Given *Feres* and *Stencel,* the most that a judgment can do which finds the government responsible for an injury is absolve the manufacturer.

On the other hand, and compared with the special relationship between a government and its soldiers, there is nothing more uniquely federal about the relationship between a military supplier and the government than there is about the relationship between a supplier and *any* agency of the government. *See, e.g., Jaffee v. United States,* 663 F.2d 1226, 1233 n. 7 (3d Cir. 1981) (*en banc*), *cert. denied,* 456 U.S. 972 (1982). It is hardly possible for Whittaker to contend, for example, that the supply of its simulators (which are pyrotechnic devices used in demonstrations, and not in combat) is any more crucial to the country's defense than is the supply of encyclopedias or movies to goverment libraries: both supply examples of what a nuclear explosion looks and sounds like, and the library materials furnish a great deal more information besides. In the final analysis, *all* government procurement policies, and not just the military's, are adversely affected by negligent manufacture. The consequences of defective components in an FAA radar can be just as costly, if not more, than the consequences of a negligently assembled howit-

zer.[4] There is thus no basis for affording special tort immunity just to military suppliers for their own carelessness in manufacture.

To be sure, Whittaker claims that it does not ask that military contractors "be absolved of responsibility for defective products" (Petition for Certiorari, at 10). But in suggesting that existing remedies against military contractors for false claims (18 U.S.C. § 287), false swearing (18 U.S.C. § 1001), and for mail and wire fraud (18 U.S.C. §§ 1341, 1343) are adequate to cover the case of a serviceman killed or maimed by a defectively manufactured product, Whittaker shows the impoverishment of its argument. The issue it raises is unworthy of certiorari, and Whittaker's request should be denied.

II

THE CHOICE OF FEDERAL LAW IS IRRELEVANT, SINCE THE MILITARY CONTRACTOR'S DEFENSE IS INAPPLICABLE AND OTHER FEDERAL LAW DOES NOT DIFFER FROM THE STATE LAW APPLIED IN THIS CASE

The second question on which Whittaker requests certiorari is as unworthy of review as the first. Whittaker asks that a common federal law be declared applicable to all suits by servicemen against military suppliers. As will be seen, the only possible advantage that Whittaker could gain by such a result is that the military contractor's defense would receive general recognition

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[4] To the extent that a manufacturer of defective products is forced to bear the costs of its negligence, the result may well be to raise the cost of the military's dealing *with that particular manufacturer*. The purpose of competitive bidding, however, is precisely to weed out those manufacturers who are not cost-effective. Whittaker's argument makes the wholly unsupported assumption that most or all manufacturers are negligent, so that competitive bidding will not be effective to screen out costs due to liability. Even if that were the case, however, Whittaker does not explain why a court, rather than Congress, should make the social policy decision that soldiers (and the government via the Veterans Benefits Act) should bear the costs of negligent manufacture rather than the contractor.

—in *design defect* cases. (*See* argument *supra,* at 5-6.) Since this case involves a manufacturing defect, Whittaker profits nothing by its argument.

Given that the United States itself has consented to be held liable in tort under the respective and differing laws of the fifty states, 28 U.S.C. § 2674, and given that as a manufacturer whose distribution is nationwide, Whittaker is subject to varying state standards under current law, respondents submit that there is no reason to supplant traditional state-law concepts of tort just for manufacturers of defective military products, like Whittaker. Except for the military contractor defense, Whittaker cannot show any area in which federal common law, if held applicable, would be different from state law. This is particularly true with respect to the issues of strict liability, negligence, *res ipsa loquitur* and damages involved in this case.[5] As discussed in the previous section, there are no military policy or procurement issues at stake

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[5] As Whittaker recognizes (Petition at 13, n. 9), any federal law in this area would probably be drawn from the "well developed body of federal admiralty law." But it is precisely because admiralty law, in turn, has drawn upon *state tort law* that the concepts of strict liability and *res ipsa loquitur* do not differ under the respective jurisdictions. (We speak here of the Hawaii law applied in this case; as the Ninth Circuit noted, California's law on *res ipsa* is slightly different.) *See* Lindsay v. McDonnell Douglas Aircraft Corporation, 460 F.2d 631, 635-36 (8th Cir. 1972); Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co., 565 F.2d 1129, 1134-35 (9th Cir. 1977) (applying strict liability as matter of general maritime law); Johnson v. United States, 333 U.S. 46, 48-49 (1948); Cox v. Northwest Airlines, Inc., 379 F.2d 893, 895 (7th Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968) (applying *res ipsa loquitur* to cases under Jones Act and Death on the High Seas Act).

There is no federal statute of limitations which Whittaker can cite for products liability claims, nor is there a federal statute (other than in an admiralty context—see 46 U.S.C. § 761 et seq.) specifying damages in the event of wrongful death. To the extent federal courts are called on to supply rules of decisions in these areas, they quite justifiably draw on, and in some instances are directed to, state law. (*See, e.g.,* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405-08 [1970]; Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 583-595 [1974].) Thus Whittaker cannot show how resort to federal common law in this case would

in a case involving a defectively *manufactured* product. The military is just as entitled as a civilian consumer to receive a product that has been properly assembled and is fit for its intended use. *See* argument *supra,* at 5-8; *see also Challoner v. Day & Zimmermann, Inc.,* 512 F.2d 77, 84 (5th Cir.), *vacated on other grounds,* 423 U.S. 3 (1975). In vacating and remanding *Challoner,* this Court left it open to the Court of Appeals to determine which law would apply to claims of death and personal injury due to a defectively manufactured howitzer that exploded prematurely in Cambodia. Each court in *Challoner* assumed that under Texas choice-of-law principles, Cambodian law (the law of the place of injury) might well apply; there was no indication that the federal interests at stake were such as to require application of federal common law.

Whittaker's argument not only proceeds from a false assumption (that the military contractor defense applies to cases of manufacturing defects), it arrives at an erroneous conclusion (that federal common law would differ significantly from Hawaii law on traditional tort concepts of negligence, strict liability and *res ipsa loquitur*). For these reasons, the petition should be denied with respect to Whittaker's second question presented for review.

III

THE JUDGMENT BELOW CORRECTLY HOLDS THAT RULE 59(e) DOES NOT APPLY TO THE INITIAL GRANTING OF RELIEF, BUT ONLY TO THE CORRECTION OF ERROR

The court below properly decided that a first-time, postjudgment motion for prejudgment interest following a successful verdict is not subject to the strict ten-day limitation of Fed. R. Civ. Proc., Rule 59(e). In doing so, the Ninth Circuit applied the principles which this Court declared in *White v. New Hampshire Department of Employment Security,* 455 U.S. 445 (1982). There is no conflict between this decision and the decisions of any

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have produced a different result with respect to any of the issues it involved.

other circuit. Furthermore, the decision is correct, and so there is no need to grant certiorari.

In *White,* this Court held that a postjudgment, first-time motion for attorneys' fees under 42 U.S.C. § 1988 raises "legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." 455 U.S. at 451. Rule 59(e) was intended to deal with the correction of error in a judgment before it became final. A judgment which neither granted nor denied attorneys' fees because the court had not yet been asked to address the issue (and could not be asked until one party had prevailed) incorporated no error in need of correction.

Precisely the same points that were true of the motion for attorneys' fees in *White* are true of the first-time, postjudgment motion for prejudgment interest filed in this case. The motion "does not imply a change in the judgment, but merely seeks what is due because of the judgment" (*id.* at 452). Prejudgment interest may be awarded

> only to a "prevailing party." Regardless of when [it is] requested, the court's decision of entitlement to [interest] will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can [prejudgment interest] fairly be characterized as an element of "relief" indistinguishable from other elements. Unlike other judicial relief, [prejudgment interest is] not compensation for the injury giving rise to an action. [Its] award is uniquely separable from the cause of action to be proved at trial . . . .

Id. at 451-52 [substituting "interest" for "attorney's fees"]. As the Ninth Circuit also noted, "Prejudgment interest compensates not for the *injury* giving rise to the action, but for the *delay* between injury and judgment. . . . Both attorney's fees and prejudgment interest seek what is due because of the judgment, the former in terms of money expended, the latter in terms of time." 785 F.2d at 737 (emphasis in original).

The cases which Whittaker cites as being in conflict with the Ninth Circuit's decision in this case are in reality distinguishable on their facts.[6]

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[6] In Elias v. Ford Motor Co., 734 F.2d 463 (1st Cir. 1984), the original judgment already included an award of prejudgment interest, and the plaintiff had declined to appeal it. The *Elias* court's assertion that prejudgment interest is not a "collateral matter" like attorney's fees must thus be taken in the context of the case, in which the plaintiff was seeking to correct an alleged error in the prejudgment interest he had been awarded.

In Stern v. Shouldice, 706 F.2d 742, 746-47 (6th Cir. 1983), the plaintiff had actually brought a motion for prejudgment interest within ten days of judgment, and jurisdiction on appeal depended on whether the motion could be classified as a 59(e) motion. Ordinarily a postjudgment motion will be granted or denied separately from the judgment, and the appeal is taken from both the judgment and the postjudgment order. But there is nothing in Rule 59 to prevent a party from seeking to have the court actually incorporate additional relief in the body of the judgment, provided only that he makes application to do so within ten days—and that is what the plaintiff had done in *Stern*. Thus the case is not in conflict with the decision below.

Goodman v. Heublein, Inc., 682 F.2d 44, 45-47 (2d Cir. 1982) involved a motion that was presented only after the appeal from the damage award had become final, and is thus to be contrasted with the Second Circuit cases cited in the text before n. 7, *infra*, in which the court corrected the judgments to allow prejudgment interest while it still had jurisdiction of the appeals.

Spurgeon v. Delta Steamship Lines, Inc., 387 F.2d 358, 358-59 (2d Cir. 1967), was a pre-*White* case in which the original judgment again had included prejudgment interest, but had not been appealed; Glick v. White Motor Co., 458 F.2d 1287, 1293-94 (3d Cir. 1972), involved a judgment which should have included an award of prejudgment interest mandated by statute, and thus it was subject (after the ten-day period of Rule 59[e] had lapsed) to correction under Rule 60(a). Finally, the court in Gilroy v. Erie-Lackawanna R.R. Co., 44 F.R.D. 3, 4 (S.D.N.Y. 1968) mentioned in dictum that a motion for discretionary prejudgment interest is properly brought under Rule 59(e), but its principal holding was that plaintiff would not have been entitled to prejudgment interest in any event.

Finally, the ruling below is also proper because the Ninth Circuit had, independently of the district court, power to correct the denial of prejudgment interest on direct appeal from the judgment. (*See Mallis v. Bankers Trust Co.*, 717 F.2d 683, 692-93 [2d Cir. 1983]; *Newburger, Loeb & Co. v. Gross*, 611 F.2d 423, 432-33 [2d Cir. 1979]; *cf. Adams v. Lindblad Travel, Inc.*, 730 F.2d 89, 93 [2d Cir. 1984].) Thus a grant of certiorari on Whittaker's third question, even if this Court were to decide to review what is an interlocutory decision on prejudgment interest, would not alter the outcome below.[7] For these reasons, therefore, certiorari of Whittaker's third question should be denied.

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[7] The Ninth Circuit reversed the judgment of the district court and remanded the case for a determination in the first instance of whether, in the district court's exercise of discretion, prejudgment interest should be awarded to plaintiff. The judgment fails to award any relief to plaintiff on the interest sought; it is thus not a final judgment. Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976). While that fact does not preclude certiorari under 28 U.S.C. § 1254(1), this Court's policy of avoiding review of interlocutory orders except on important questions "fundamental to the further conduct of the case," United States v. General Motors Corp., 323 U.S. 373, 377 (1945), is thus another reason to deny certiorari.

IV
CONCLUSION

The petition for certiorari filed by Whittaker does not present any issues worthy or in need of review by this Court. The issue of military contractor immunity for manufacturing defects was neither pleaded, briefed nor argued in either the district court or the court of appeals. The issue of federal common law is a red herring, given that the military contractor defense is inapplicable to a manufacturing defect case such as this one, and given that remaining federal law would not demonstrably have altered the outcome of this case in any event. Last but not least, the issue of prejudgment interest was correctly decided on at least two grounds, and does not present any conflict with existing law.

For the reasons herein stated, respondents request that this Court deny the petition for certiorari.

Respectfully submitted,

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In the United States District Court
For the District of Hawaii

Civil No. 80-0195

Perry D. Jenkins, Annabelle Jenkins, and Stuart A. Kaneko
as Special Administrator of the Estate of
Jeffrey Scott Jenkins, Deceased,
Plaintiffs,

vs.

Whittaker Corporation, dba Bermite Corporation,
a Division of Whittaker Corporation,
a California corporation, John Does 1-10,
Doe Corporations 1-10, and Doe Partnerships 1-10,
Defendants.

ANSWER TO COMPLAINT

Whittaker Corporation (hereinafter "Whittaker"), one of the Defendants above-named, for answer to the Complaint filed herein, alleges as follows:

FIRST DEFENSE

1. Plaintiffs' Complaint fails to state a claim against Whittaker upon which relief can be granted.

SECOND DEFENSE

COUNT I

2. Whittaker admits the allegations contained in paragraphs 2, 3 and 4 of the Complaint.

3. Whittaker denies the allegations contained in paragraphs 5, 6, 7, 8, 9 and 10 of the Complaint.

4. Whittaker is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

COUNT II

5. In answer to paragraph 11, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 10 of the Complaint.

6. Whittaker denies the allegations contained in paragraphs 12 and 13 of the Complaint.

COUNT III

7. In answer to paragraph 14, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 13 of the Complaint.

8. Whittaker denies the allegations contained in paragraphs 15, 16 and 17 of the Complaint.

COUNT IV

9. In answer to paragraph 18, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 17 of the Complaint.

10. Whittaker denies the allegations contained in paragraph 19 of the Complaint.

COUNT V

11. In answer to paragraph 20, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 19 of the Complaint.

12. Whittaker denies the allegations contained in paragraph 21 of the Complaint.

COUNT VI

13. In answer to paragraph 22, Whittaker realleges and reaffirms the responses given in answer to paragraphs 1 through 21 of the Complaint.

14. Whittaker denies the allegations contained in paragraph 23 of the Complaint.

15. Whittaker denies any and all other allegations in the Complaint.

THIRD DEFENSE

Plaintiffs' damages, if any, were caused by the negligence of Plaintiffs' decedent or others and Plaintiffs' claim against Whittaker is barred, or reduced, because of said negligence.

FOURTH DEFENSE

Plaintiffs' decedent or others misused or altered the subject product and Plaintiffs' claims are barred as a result of such misuse or alteration.

FIFTH DEFENSE

The subject product met all applicable safety standards and Plaintiffs' claims are barred as a result.

SIXTH DEFENSE

The Court lacks jurisdiction over Whittaker.

SEVENTH DEFENSE

Plaintiffs are barred from maintaining this action by reason of Plaintiffs' decedent's voluntary assumption of a known risk.

EIGHTH DEFENSE

Plaintiffs' claims are barred by the statute of limitations.

NINTH DEFENSE

Plaintiffs' claims are barred by Plaintiffs' failure to provide timely notice of the breach of any warranties as they now allege in their Complaint.

WHEREFORE, Whittaker prays that:

1. Plaintiffs' Complaint against it be dismissed;

2. The Court award Whittaker its reasonable costs and attorney's fees; and

3. The Court order such other relief as it deems equitable and proper.

Dated: Honolulu, Hawaii, May 30, 1980.

/s/ . SUSAN P. WALKER
Burnham H. Greeley
Susan P. Walker

Attorneys for Defendant
WHITTAKER CORPORATION

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WHITTAKER CORPORATION,

Petitioner,

v.

PERRY D. JENKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 85-2115

In the Supreme Court of the United States

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WHITTAKER CORPORATION,

Petitioner,

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PERRY D. JENKINS,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's opposition to the Petition for Writ of Certiorari urges, *inter alia*, that the petition be denied because (i) the court below did not address whether military contractors should be immune from civil damage suits by members of the Armed Forces for service related injuries, (ii) the immunity issue is not worthy of certiorari because immunity would be inappropriate and, (iii) assuming that military contractors are not immune from such suits, application of federal common law would have made no difference in the ultimate result. Whittaker submits that none of those reasons warrant a denial of the petition.

Whittaker's petition also sought certiorari on a question concerning prejudgment interest. Respondents'

opposition concedes a conflict a[illegible]g the circuits, but seeks to "distinguish" the cases. Since respondents raise no new points, no reply will be made by Whittaker on this issue.

I

FAILURE BY THE COURT BELOW TO CONSIDER THE ISSUE OF MILITARY CONTRACTOR IMMUNITY FROM CIVIL DAMAGE SUITS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE DOES NOT PRECLUDE CONSIDERATION OF THAT ISSUE BY THIS COURT

Whether members of the Armed Forces or their representatives can maintain a civil damage suit against military contractors for service related injuries raises nothing more than whether a claim upon which relief can be granted was stated. That type of question is a pure issue of law. *State of Georgia v. Wenger,* 187 F.2d 285, 287 (7th Cir. 1951), *cert. denied,* 342 U.S. 822 [72 S.Ct. 41, 96 L.Ed 621] (1951), *rehearing denied,* 342 U.S. 874 [72 S.Ct. 105, 96 L.Ed 657] (1951). This Court has recognized that when a pure issue of law is presented, and when no useful purpose would be served by first securing consideration of that issue by the court of appeals, the issue is appropriate for immediate resolution by this Court. *Nixon v. Fitzgerald,* 457 U.S. 731, 743 n.23 [102 S.Ct. 2690, 2698 n. 23, 73 L.Ed.2d 349] (1982).

Moreover, while it is true that "normally" this Court will not consider questions not raised[1] or resolved in

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[1]Whittaker did raise the defense of failure to state a claim upon which relief can be granted in its Answer to Complaint. (Appendix A-1 to Brief in Opposition to Petition for Writ of Certiorari.)

the lower court, *Adickes v. S.H. Kress and Company,* 398 U.S. 144, 147 n.2 [90 S.Ct. 1598, 1602-1603 n.2, 26 L.Ed.2d 142] (1970), "the rule is not inflexible." *Youakim v. Miller,* 425 U.S. 231, 234 [96 S.Ct. 1399, 1401, 47 L.Ed.2d 701] (1976).

In this case no useful purpose would have been, or will be, served by first having the court below consider the question of military contractor immunity. The court below has already indicated *in dicta* a position against such immunity for manufacturing defects. *McKay v. Rockwell Intern. Corp.,* 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied,* 464 U.S. 1043 [104 S.Ct. 711, 79 L.Ed.2d 175] (1984).

Given, therefore, the pure issue of law presented by the question of military contractor immunity, the inherent power of this Court to consider that issue, and that no useful purpose would be served by having the court below consider the issue, the fact that the court below did not expressly consider the issue in this case does not preclude consideration of the issue by this Court.

II

THE ISSUE OF MILITARY CONTRACTOR IMMUNITY FROM CIVIL DAMAGE SUITS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE SHOULD BE CONSIDERED BY THIS COURT BECAUSE OF POLICY CONSIDERATIONS UNIQUE TO THE MILITARY

Respondents' position that the issue of military contractor immunity from civil damage suits based upon injury to or death of members of the Armed Forces in the course of military service is "not worthy of

certiorari" results from an erroneous assumption that the policy considerations set forth in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 [97 S.Ct. 2054, 52 L.Ed.2d 665] (1977), and *Feres v. United States,* 340 U.S. 135 [71 S.Ct. 153, 95 L.Ed. 152] (1950), are only applicable to suits seeking to impose liability on the Government. That assumption is unfounded. *See Tozer v. LTV Corporation,* No. 84-1907(L) (4th Cir. 5/27/86) (Appendix H, at 6-9).

Among the policy considerations underlying *Feres* and *Stencil Aero* is that members of the Armed Forces should not be required to testify in court as to each other's decisions and actions. This is a policy consideration applicable to suits by members of the Armed Forces against individuals. *Chappell v. Wallace*, 462 U.S. 296 [103 S.Ct. 2362, 76 L.Ed.2d 586] (1983); *Tozer v. LTV Corporation, supra.* It is the specter of a trial involving this kind of testimony, not who is ultimately liable, which is the concern of this Court. *United States v. Shearer,* ___ U.S. ___ [105 S.Ct. 3039, 3043-3044, ___ L.Ed.2d ___] (1985). See also *Bozeman v. United States*, 780 F.2d 198, 201-202 (2d Cir. 1985).

In the instant case, eleven members of the Armed Forces testified. Some members were critical of other members decisions and actions. The adequacy of training, preparation, and supervision, as well as the adequacy of the officer in charge, were placed in issue for the jury to consider.[2] This type of litigation will continue to pit members of the Armed Forces against each other as manufacturers defend cases by urging that training was inadequate and that military personnel were

[2]Two examples of such testimony elicited during discovery for use at trial are attached as Appendices I (Colonel John Michael Moerls) and J (former Sergeant Thomas Charles Dappert). Portions of the depositions were read to the jury.

incompetent. Surely, with all of its other responsibilities and problems, the military does not need its personnel involved in civil damage suits, with their attendant discovery, wherein military personnel can criticize and blame each other for an accident which occurred in the course of military service. As evidenced by reported opinions, the number of these types of suits is escalating. The time has come to consider whether they should be allowed.

As for manufacturer responsibility for manufacturing defects, Whittaker has not suggested that manufacturers be absolved of all responsibility. Rather, the issue is to whom should the military contractor have to answer. Whittaker submits it should only be to the Government because of the military policy considerations heretofore recognized by this Court. Moreover, the remedies available to the Government include not only monetary relief, but also severe penalties (e.g. debarment).

III

FEDERAL COMMON LAW WOULD HAVE COMPELLED A DIFFERENT RESULT THAN THE RESULT DICTATED BY HAWAII LAW

Respondents contend that federal common law would have made no difference in this case. The fact is that the court below, whose opinion respondents laud, stated that, "the difference in the laws would significantly affect major issues in the case . . . " (Appendix A to Petition for Writ of Certiorari, at 6 n.4). The court below knew, when it made that statement, that it was dealing with a manufacturing defect case.

One clear difference flows from the application of the doctrine of *res ipsa loquiter*. Respondents correctly note that *res ipsa loquiter* is recognized in admiralty law,

Cox v. Northwest Airlines, Inc., 379 F.2d 893, 895 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 [88 S.Ct. 788, 19 L.Ed.2d 836] (1968), but go on to suggest that *res ipsa loquiter* as recognized in admiralty law is identical to *res ipsa loquiter* as recognized by Hawaii law. That is not the case.

Under Hawaii law *res ipsa loquiter* can be used even if the injury-producing instrumentality was not under the control and management of the defendant at the time of the accident. (Appendix A to Petition for Writ of Certiorari, at 19-20) In *Cox*, however, the court found that the instrumentality which produced the death was under the exclusive control and management of the under the exclusive control and management of the respondent. *Cox v. Northwest Airlines, Inc., Supra* at 894. *Accord, Asprodites v. Standard Fruit & Steamship Co.*, 108 F.2d 728, 729, (5th Cir. 1940), *cert. denied*, 310 U.S. 642 [60 S.Ct. 1089, 84 L.Ed. 1410] (1940) (*res ipsa loquiter* not applicable to ship owner because thing that caused injury was under the exclusive control and management of injured party when accident occurred);[3] *Cruse v. Sabine Transp. Co., Inc.*, 88 F.2d 298, 300 (5th Cir. 1937), *cert. denied*, 302 U.S. 701 [58 S.Ct. 20, 82 L.Ed. 541] (1937) rehearing denied, 302 U.S. 775 [58 S.Ct. 134, 82 L.Ed. 600] (1937) (*res ipsa loquiter* inapplicable because vessel not in the exclusive control of owners at time of explosion).

In addition, Hawaii law allowed the use of *res ipsa loquiter* despite evidence of an equally plausible explanation for the second explosion which did not involve the Whittaker simulator (Appendix A to the

[3]In the instant case the simulator was under the exclusive control and management of the decedent and his fellow servicemen when the accident occurred.

Petition for Writ of Certiorari, at 20-21, n.26). Admiralty law does not allow application of the doctrine under these circumstances. *Luckenbach S.S. Co. v. Buzynski*, 31 F.2d 1015 (5th Cir. 1929), *cert. denied*, 279 U.S. 867 [49 S.Ct. 483, 73 L.Ed. 1004] (1929) (*res ipsa loquiter* inapplicable where cause of accident is a matter of mere speculation and conjecture.)

Thus, the fact that the doctrine of *res ipsa loquiter* would be recognized as a part of federal common law does not mean that federal common law would adopt Hawaii's standards for use of the doctrine. To the extent that admiralty law were used to define federal common law, Hawaii's standards would not be followed. Without the aid of *res ipsa loquiter*, respondents could not have prevailed. Federal common law would, therefore, have produced a significantly different result.[4]

This Court has consistently stated in *Feres* and *Stencil Aero* that the local law of the various states should not define the extent of rights and remedies where military considerations are involved. It recently reaffirmed that view in *United States v. Shearer*, ___ U.S. ___ [105 S.Ct. 3039, 3043-3044 n.4, ___ L.Ed.2d ___] (1985). Consistent with that view the time has now come to consider at least whether the local law of the various states should continue to govern military contractor liability to members of the Armed Forces or their representatives for service related injuries, or whether one uniform federal common law would be more appropriate.

[4]The court below expressly recognized that choice of law would also affect other issues apart from *res ipsa loquiter* (e.g. (i) what standard will govern the timeliness of suit; (ii) would federal common law adopt strict liability and warranty theories of liability in this type of suit; and (iii) what types of damages would be recoverable.) Appendix A to Petition for Writ of Certiorari at 6, n.4.

IV

ISSUES RAISED BY THIS PETITION ARE RELATED TO ISSUES RAISED BY THE PETITION FOR WRIT OF CERTIORARI IN *GRUMMAN AEROSPACE CORPORATION V. SHAW*, NO. 85-1529

Subsequent to Whittaker filing its Petition for Writ of Certiorari, it learned of the Petition for Writ of Certiorari in *Grumman Aerospace Corp. v. Shaw*, No. 85-1529. While *Grumman* involves the appropriate standard for defining the military contractor defense for design defects,[5] to the extent that *Grumman* raises questions of a lay jury second guessing military decisions and requests a uniform standard for the defense, it raises issues which are related to those raised by Whittaker concerning civil damage suits involving a need to second guess military decisions and the need for a uniform federal common law if these suits are to be allowed.

V

CONCLUSION

Whittaker's Petition for Writ of Certiorari presents questions left unanswered by *Feres* and *Stencil Aero*. Without guidance by the Court as to whether and, if so, under what circumstances military contractors can be subjected to civil damage suits by members of the Armed Forces for service related injuries, the number of civil damage suits against military contractors will continue to escalate. The policy considerations of *Feres* and *Stencil Aero*, as well as the nation's defense procurement policy, will *sub silentio* fall victim to them.

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[5]The question of design defect was submitted to the jury in this case. The jury found no design defect.

Given the well developed bodies of, on the one hand, state tort, product liability, and warranty law and, on the other hand, admiralty law, this Court is now in a position to address the military contractor issues presented herein. *See East River Steamship Corp. v. Transamerica Delaval Inc.*, ___ U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___] (1986). Moreover, nine years have passed from the time this Court last considered issues involving military contractor liability with respect to civil damage suits by members of the Armed Forces for service related injuries (*Stencil Aero*). In that nine years, there has been both an escalation of this type of suit and a resulting product liability-insurance crisis. The time is, thus, ripe for consideration by this Court of the issues presented in this petition.

For these reasons, as well as those set forth in the Petition for Writ of Certiorari, it is respectfully submitted that this petition be granted.

Respectfully submitted,

RONALD M. GREENBERG, ESQ.
RONALD M. GREENBERG,
A Professional Corporation

Attorneys for Petitioner
WHITTAKER CORPORATION

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 84-1907(L)

Joan S. Tozer, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of:
Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellees,

versus

LTV Corporation, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corporation,

Appellants.

Bell Helicopter Textron,
Lockheed Corp.,
McDonnell-Douglas Corp.,
United Technologies Corp.,

Amici Curiae.

APPENDIX H

No. 84-1907(L)

Joan S. Tozer, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of:
Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellees,

versus

LTV Corporation, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corporation,

Appellants.

Bell Helicopter Textron,
Lockheed Corp.,
McDonnell-Douglas Corp.,
United Technologies Corp.,

Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (C/A 81-2134).

Argued: December 5, 1985 Decided: May 27, 1986

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Drew Pomerance (Kern and Wooley; Charles E. Iliff, Jr.; Semmes, Bowen & Semmes on brief) for Appellants; Michael J. Pangia (Smiley, Olson, Gilman & Pangia; Paul D. Bekman on brief) for Appellees; (Lewis T. Booker; L. Neal Ellis, Jr.; Hunton & Williams on brief) for Amici Curiae.

WILKINSON, Circuit Judge:

In 1980, Lieutenant Commander Eliot Tozer was killed when the Navy plane he was piloting crashed. His widow, Joan Tozer, and his two minor children brought an action against LTV Corporation and its subsidiary Vought Corporation under the Death on the High Seas Act (DOHSA) 46 U.S.C. § 761 *et seq.* and general maritime law, alleging the defective design of a modification to the airplane. The jury returned a verdict in favor of the plaintiffs. Because the government contractor defense shields the contractor from liability for design defects under either a strict liability or a negligence theory when the government has approved reasonably detailed specifications, we reverse and remand for entry of judgment in favor of the defendants.

I.

Tozer's crash occurred off the coast of California while his plane was executing a low-altitude, high speed fly-by of its carrier, the U.S.S. Kitty Hawk. At trial, Joan Tozer contended that the plane had crashed because a panel known as the "Buick Hood" had come off in

mid-flight, causing him to lose control of his Navy RF-8G Reconnaissance plane. The Buick Hood is a hinged panel that permits access to the equipment underneath so that it can be repaired and maintained; the panel should not open during flight.

When the RF-8G was first designed, it had a one-piece panel that wrapped around the top of the aircraft. In order to do maintenance or repair work in the compartment below, the whole panel had to be removed. The Navy asked Vought to modify the panel so that the systems beneath it could be more easily and quickly maintained. Vought cut the panel into three pieces, fixing the center piece to the aircraft, and hinging the two outer pieces along the center line. The non-hinged sides of the hood are fastened with "camlocs," quick fasteners which can be released by a turn of a screwdriver. Tozer contends that it is well known that camlocs often come loose, because of wear, vibration, or corrosion, and that usually many camlocs are installed for safety. Tozer said that Vought was negligent because it did not fasten the panel with redundant camlocs.

Vought contended the design had been carefully analyzed, tested, and found adequate. More fundamentally, Vought argued that it could not be found liable for the design of the aircraft since the Navy had approved it, and the company shared the United States' immunity through the government contractor defense. The district judge instructed the jury that the government contractor defense precluded recovery on the basis of strict liability, but did not instruct the jury on the defense with respect to negligence. The jury returned a special verdict, finding that defendants were negligent in the design of the Buick Hood modification and that the U.S. Navy had reviewed and approved reasonably detailed specifications for the

Buick Hood modification. The jury awarded $350,000 to Joan Tozer, and $50,000 to each of her two daughters.

Vought contends that the district judge should have instructed the jury that the government contractor defense precludes recovery for negligence as well as strict liability. We agree that the defense aplies here to prevent recovery under either theory and reverse and remand for entry of judgment notwithstanding the verdict in favor of Vought.[1]

II.

Traditionally, the goverment contractor defense shielded a contractor from liability when acting under the direction and authority of the United States. *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20 (1940). In its original form, the defense covered only construction projects, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711 (1984). Its application to military contractors, however, serves more than the historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government. It advances the separation of powers and safeguards the process of military procurement. We consider each of these values in turn.

The judicial branch is by design the least involved in military matters. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially

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[1]We do not accept Tozer's argument that defendants waived the government contract defense by not setting it out in their answer. As the district court noted, the delay "was primarily due to the fact that the *McKay* case, which was the sole authority cited in their motion, had only recently been decided."

professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973) (emphasis in original). Judges possess no power "To declare War . . . To raise and support Armies . . . To provide and maintain a Navy." U.S. Const. art. 1, sec. 8, cl. 11-13. Nor have they been "given the task of running the Army," *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). In the face of a "textually demonstrable" commitment of an issue to "a coordinate political department," *Baker v. Carr,* 369 U.S. 186, 217 (1962), judicial caution is advisable. Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.

It is difficult to imagine a more purely military matter than that at issue in this case — the design of a sophisticated reconnaissance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour. It should be axiomatic that "considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts." *In re Agent Orange Product Liability Litigation*, 534 F.Supp. 1046, 1054 n.1 (E.D.N.Y. 1982).

Here, however, the jury was invited to "second-guess military decisions," *see United States v. Shearer,* 105

S.Ct. 3039, 3043 (1985), and to judge the design of a Navy-approved aircraft. Special interrogatory number one inquired of the jury whether defendants were "negligent in the design of the Buick Hood modification," and interrogatory five questioned whether the hood was "defective in that its design rendered it unreasonably dangerous." A group of laymen was thus ineluctably thrust into the intricacies of military technology involving, in the words of the district court, "the structural reaction of the modified Buick Hood panel to aerodynamic forces and loads experienced by the aircraft."

These are judgments, however, which lay men and women are neither suited nor empowered to make. There is a danger in transporting the rubric of tort law and products liability to a military setting and military technology. While jurors may possess familiarity and experience with consumer products, it would be the rare juror — or judge — who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver. Moreover, "the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay,* 704 F.2d at 449-50. What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of the aircraft. *Cf.* Note, *McKay v. Rockwell International Corp.: No Compulsion for Government Contractor Defense,* 28 St. Louis U.L.J. 1061, 1071 (1984) ("Plaintiff's comparison of the jeep to a civilian passenger vehicle was inappropriate since the two vehicles were not made for similar uses.") Difficult choices, trade-offs, and compromises inhere in military planning that simply find

no analogue in civilian life. "This is not to say that [military] designers are unconcerned with safety. Rather, they attempt to design as safe a plane as possible within the scope of its mission." *Kropp v. Douglas Aircaaft Co.,* 329 F.Supp. 447, 456 (E.D.N.Y. 1971).

The defense protects against judicial interference in military matters in other ways as well. We cannot accept the view that "the danger of interfering with [military] discipline in military contractor cases 'is too remote to be accorded significant weight when the decision only indirectly involves military orders or practices concerning active duty soldiers.' " *Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 743 (11th Cir. 1985), *quoting Cole v. United States,* 755 F.2d 873, 879 (11th Cir. 1985). The fact that the challenge here does not involve Tozer's immediate commanding officer or relate to matters of personal discipline is irrelevant. Military contractors ordinarily work so closely with the military, see section III, *infra,* that it is nearly impossible to contend that the contractor defectively designed a piece of equipment without actively criticizing a military decision. Civilian scrutiny of such decisions is generally exerted through executive and legislative oversight on behalf of the public at large, not, as here, through the judiciary at the behest of an individual serviceman. In cases such as these, "members of the armed services would be allowed to question military decisions and obtain relief from actions of military officials." *Bynum v. FMC Corporation,* 770 F.2d 556, 565 (5th Cir. 1985). Trial "would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977). While debate over the safety and necessity of advance weaponry is essential, the First Amendment

does not require that the forum be the courtroom or the vehicle be a lawsuit.

The disallowance of recovery in these actions will not leave servicemen or their survivors without relief. The Veterans' Benefits Act "provides a swift, efficient remedy for the injured serviceman." *Stencel,* 431 U.S. at 673. Thus one classic rationale for tort liability — that of compensation of victims — is less compelling in this context. While the Veterans' Act does not provide all elements of damages in the usual wrongful death action, recovery is more reliable, and not "reduced by the high transaction costs present in ordinary products liability litigation." *McKay,* 704 F.2d at 452, n.11.

Forcing military mishaps into the mold of products liability litigation carries one final drawback. Pilots of the Navy and Air Force, whose service and sacrifice make possible the security of this country, are not the military doubles of civilian motorists. Their lives are led in the company of peril. We can express it no better than Judge Sneed did for the court in *McKay:*

> [Pilots] recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is partof the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled.

704 F.2d at 453.

III

The second set of reasons for the government contractor defense also has its roots in military soil. Permitting recovery for design defects under any theory of liability risks altering the nature of the procurement process. Specifically, we anticipate that in the absence of the defense, there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development.

Contractor participation in design is essential to the development of a military force that is competitively equipped. Equipment designs often are the result of "continuous back-and-forth" between the military and the contractor. *Koutsoubos v. Boeing Vertol,* 755 F.2d 352, 355 (3d Cir.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 72 (1985). The contractor and the military pool their expertise, matching the latest advances in military technology with the specific dictates of the mission. We recognize this back-and-forth as a reality of the procurement process, as well as a valuable part of that process; indeed if military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors.

Here the testimony at trial indicated that Vought worked closely with the Navy in developing the specifications for the aircraft. Vought's project manager for the RF-8G program testified that the engineering change proposal that included the Buick Hood modification was "a continual source of discussion" between Vought and the Navy, and that Navy engineers visited Vought every few months for progress reviews. The contractor's participation in design — or even its origination of specifications — does not constitute a

waiver of the government contractor defense. If the defense were to be waived by such participation, the contractor would be trapped between its fear of liability and its desire to provide needed ideas and information. The "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment" would be lost. *McKay,* 704 F.2d at 450. Without the defense, "military contractors would be discouraged from bidding on essential military projects." *Bynum v. FMC,* 770 F.2d at 566. Thus the defense will be permitted to a participating contractor so long as government approval of design "consists of more than a mere rubber stamp." *Schoenborn v. Boeing,* 769 F.2d 115, 122 (3d Cir. 1985). If there is genuine governmental participation in the design, "the defense is available." *Id.*

Finally, disallowing the government contractor defense might raise the already high costs of military equipment. "Military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales." *McKay,* 704 F.2d at 449. Such pass-through costs would, of course, defeat the purpose of the immunity for military accidents conferred upon the government itself. *Stencel,* 431 U.S. at 673. While distribution of the costs of mishaps to the consuming public may be a familiar feature of products liability law, we are loathe to grant courts and juries a similar power to swell the public costs of meeting the nation's requirements in national security. Though one court has speculated that tort liability would provide legal incentives for "better-designed planes and fewer costly accidents," *Shaw,* 778 F.2d at 742, that judgment

is not a matter for the judicial economists but for the Executive in its dealings with contractors and for the Congress in defining the scope of immunities under the Federal Tort Claims Act.

IV.

There remains the application of the elements of the military contractor defense to the facts of this case. In *McKay,* the court held that

> a supplier of military equipment is not subject to [strict liability in tort] for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*,[2] (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors on the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451.

There is no question that Vought qualifies for the government contractor defense under this test. It is undisputed that the United States was itself immune from liability and that the Buick Hood modification

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[2]In *Feres v. United States*, 340 U.S. 135 (1950), the government was held not liable under the Federal Tort Claims Act for injuries to servicemen in the course of military service. In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977), the United States was not required to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

conformed to specifications. The jury specifically found that the Navy reviewed and approved "reasonably detailed specifications for the Buick Hood modifications," and, further, that the contractor did not fail "to notify the Navy of dangers created by the specifications which were known to defendants but unknown to the Navy."

Nevertheless, the district court upheld the verdict for Tozer on the basis of the jury's findings that defects in the design of the Buick Hood proximately caused plaintiff's death. The district court considered the defense "applicable to a cause of action based on strict liability," but unavailable to a "government contractor who is alleged to have established negligent design specifications."

In so holding, the trial court was in error. The defense applies "equally well to design defect cases based on negligence and/or breach of warranty claims." *Tillett v. J. I. Case Co.,* 756 F.2d 591, 597 n.3 (7th Cir. 1985); *see also Schoenborn.* The policies discussed earlier apply forcefully in either a negligence or a strict liability context. Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery. In this case, the jury was instructed that the government contractor defense barred recovery on strict liability, in part to prevent second-guessing of military decisions. But the jury still was compelled to evaluate the negligence claim, and thereby second-guess a design that the United States Navy had sanctioned. The danger that contractors will participate less and charge more stems from the threat of liability for government-approved technology, not from the particular theory of recovery.

In holding that the government contractor defense bars recovery on a theory of negligence as well as strict

liability, we join the growing ranks of circuit courts that recognize the utility of the defense and its inescapable function in the deflection of unwarranted judicial oversight over matters of procurement and defense.[3] *Koutsoubos v. Boeing Vertol,* 755 F.2d 352 (3d Cir. 1985); *Bynum v. FMC,* 770 F.2d 556 (5th Cir. 1985); *Tillett v. J. I. Case,* 756 F.2d 591 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444 (9th Cir. 1983). *But see Shaw v. Grumman Aerospace,* 778 F.2d 736 (11th Cir. 1985). This case involves no more than a standard application of such principles. The judgment of the district court is accordingly reversed and remanded for entry of judgment in favor of defendants.

REVERSED AND REMANDED.

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[3]Though the cause of action here was brought under federal law, the defense would apply equally to suits under the diversity jurisdiction. "With regard to the government contractor defense, most of the courts that have considered the matter have found that, at least when military design specifications provided by the government are at issue, product liability actions are likely to involve matters that are subject to exclusive federal control and necessitate the limited imposition of federal common law." *Bynum,* 770 F.2d at 567,*et seq.* The fact that a claim arises under state law does not, of course, preclude a federal defense in an area of paramount federal interest. *Id.*; Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.,* 37 Baylor L. Rev. 181, 214 (1985).

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

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PERRY D. JENKINS, et al., Plaintiffs, vs. WHITTAKER CORPORATION, etc., Defendant.	NO. 80-0195

DEPOSITION OF JOHN MICHAEL MOERLS
Taken before Joanne C. Bushaw, a Notary Public
In and for the County of Monterey
State of California

June 3, 1983

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APPENDIX I

Q. In the absence of a need to save a life, would you personally approach an atomic simulator which had fired [sic] inside the barrel that you could see?

MR. THOMAS: Excuse me, Colonel. Before you answer, let me object to the question on the ground that it's irrelevant, calls for the Colonel's personal feelings and opinion, hypothetical, assumes facts not in evidence, contains insufficient facts for an adequate response, requires speculation, and is without foundation.

MR. GREENBERG: You can answer the question.

THE WITNESS: Would I, in the absence of a need to save a life?

MR. GREENBERG: Yes.

THE WITNESS: No.

MR. THOMAS: I'll move to strike the answer for the reasons previously noted.

BY MR. GREENBERG:

Q. Given your background, training, and experience in EOD — Explosive Ordinance Disposal — as well as the other training you've had, would you expect that a person who had training in pyrotechnics to know that you ought not to approach an atomic simulator that's observed to be on fire in the absence of a need to save a life?

MR. THOMAS: Same objections. It's also vague, ambiguous, irrelevant, requires speculation. But please go ahead and respond.

THE WITNESS: I think I got lost on that one. With any person —

MR. GREENBERG: No. You can read the question back.

(The record was read.)

THE WITNESS: Yes.

MR. THOMAS: And I'll move to strike for the reasons previously noted.

BY MR. GREENBERG:

Q. Do you recall whether, on May 11, 1978, when you arrived at the accident site, you waited any particular period of time before making the initial approach you've described?

MR. THOMAS: Object to that as vague and ambiguous.

THE WITNESS: I recall asking when this had taken place, and it had taken place many hours ago. I don't recall the time frame or anything like that, but it was well past the normal wait period for grenades, or simulators, or the general waiting period, which is 30 minutes, as a general rule.

MR. THOMAS: Move to strike as non-responsive the last portion of the answer.

BY MR. GREENBERG:

Q. To your knowledge, is there a normal waiting period that persons should wait before approaching an atomic simulator that fails to fire?

MR. THOMAS: Objection, without foundation. Again calling for a hypothetical answer, assumes facts not in evidence with insufficient information to answer, requires speculation. Please go ahead.

MR. GREENBERG: Mr. Thomas is giving you all the objections he learned in law school.

THE WITNESS: Yes.

BY MR. GREENBERG:

Q. What is the wait time, Colonel?

MR. THOMAS: Excuse me, Colonel.

THE WITNESS: I cannot recall the wait period, but it is in the TM — technical manual.

MR. THOMAS: Same objections, and move to strike for the same reasons.

BY MR. GREENBERG:

Q. In Exhibit 1, your statement, the last sentence I believe says, "I will — do you see that?

A. Yes.

Q. Could you read that, please, for the record?

MR. THOMAS: Let me just object to the Colonel's reading the last sentence, based upon inadequate foundation established for use of the statement, also without foundation as to his qualifications to give such an opinion in this case. But go ahead an respond to the question.

THE WITNESS: Okay. I am commenting that approaching a smoking fire on any munition, pyrotechnic should be avoided where possible, and limit the number of personnel exposed to a potential hazard where possible.

MR. THOMAS: Also, I would like to move to strike that answer and interpose two additional objections. It's assuming facts not in evidence, and it's not based upon the Colonel's personal knowledge.

BY MR. GREENBERG:

Q. Can you recall the circumstances that caused you to make that comment?

A. I believed that these are generally good guidelines to follow on using demolition, or ordnance, or pyrotechnics, and that this investigation would yield something, and perhaps one of the things it may yield would be some general statements about operating on the ranges and so on and that might be included.

MR. THOMAS: Move to strike as non-responsive, and also for the reasons previously noted.

BY MR. GREENBERG:

Q. In the course of your investigation of this incident, do you have any recollection of learning whether or not any of the three individuals who went down range after the initial malfunction approached the fired simulator at a time when it had either smoke or fire coming from it?

MR. THOMAS: Objection. Assumes facts not in evidence, and requries a response based upon hearsay. Go ahead and answer.

THE WITNESS: Yes.

BY MR. GREENBERG:

Q. And what did you learn?

MR. THOMAS: Excuse me. Same objections.

THE WITNESS: That after the first one fired, that second one malfunctioned, the three — the individuals went down range, and this other one was still smoking.

MR. THOMAS: Move to strike for the reasons previously stated.

BY MR. GREENBERG:

Q. Do you recall whether that knowledge that you've described, whether or not that was a factor in your making these observations you just made at the end of your statement?

MR. THOMAS: Objection, no foundation. Again, we are assuming facts not in evidence, and it's also leading, and goes beyond the scope of what the Colonel was at the scene to do. But go ahead and answer.

THE WITNESS: Yes.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

PERRY D. JENKINS, ANNABELLE JENKINS, AND STUART A. KANEKO AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY SCOTT JENKINS, DECEASED,	
PLAINTIFFS,	NO. 80-0195
vs.	
WHITTAKER CORPORATION, DBA BERMITE CORPORATION, A DIVISION OF WHITTAKER CORPORATION, A CALIFORNIA CORPORATION,	
DEFENDANTS.	

DEPOSITION OF THOMAS CHARLES DAPPERT
SAN DIEGO, CALIFORNIA
DECEMBER 1, 1981

REPORTED BY MARIJANE MORALES, CSR NO. 3923

APPENDIX J

Q THEN WHAT DID YOU DO?

A WELL, THAT IS WHEN THE INFANTRY CAME AS WE WERE SETTING UP WAITING FOR THEM.

Q THEN WHAT HAPPENED?

A THEY PULLED UP. CAPT. FITZGERALD WAS ALL EXCITED.

Q CAN YOU TELL ME WHAT YOU MEAN BY "ALL EXCITED"?

A WELL, HE WAS LIKE A LITTLE KID WITH A NEW TOY.

Q THEN WHAT HAPPENED?

A WE WERE INSPECTING THE DEMO. HE GOT OFFENDED BY THAT.

Q WHY WAS HE OFFENDED?

A WE TOLD HIM THAT SOME OF IT LOOKED PRETTY OLD.

Q WHAT DID HE SAY?

A SAID, "THAT'S OKAY."

Q THEN YOU STATED THAT, "I ASKED CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING."

WHY DID YOU ASK CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING?

A BECAUSE MY LIFE WAS IN DANGER.

Q WHY DID YOU FEEL YOUR LIFE WAS IN DANGER?

A BECAUSE I DIDN'T TRUST HIM. I DIDN'T THINK HE KNEW WHAT HE WAS DOING.

Q WHY DIDN'T YOU THINK HE KNEW WHAT HE WAS DOING?

A BECAUSE I DIDN'T KNOW HIM. I ALWAYS ASSUME THAT THEY DON'T KNOW WHAT THEY ARE DOING.

Q WHO IS "THEY"?

A INFANTRY PEOPLE.

Q WHY DO YOU ASSUME THAT INFANTRY PEOPLE DON'T KNOW WHAT THEY ARE DOING?

A BECAUSE THEY HAVE NEVER HAD ANY TRAINING IN THE AREA.

Q IN THE AREA OF DEMOLITION?

A RIGHT.

Q ALL RIGHT. I AM QUOTING FROM A STATEMENT. "HE SAID, 'YES,' SO I LEFT THE SITE AND WENT BACK UP THE RANGE TO THE FIRING POINT."

DID HE SAY ANYTHING ELSE IN ADDITION TO "YES" TO YOU?

A NOT THAT I REMEMBER.

Q DO YOU RECALL HIM EVER TELLING YOU WHAT HIS QUALIFICATIONS WERE FOR SETTING UP THE SIMULATOR?

A NO.

Q WHEN YOU SAY, "I DID NOT SEE EITHER SIMULATOR HOOKED UP," WHAT EXACTLY DO YOU MEAN BY THAT?

A WELL, I SAW THEM, YOU KNOW, TAKE THE LID OFF SIMULATOR NO. 1 PULLING STUFF OUT, THE SOUND SIMULATOR. THAT IS ALL I CAN REALLY REMEMBER, THEM PULLING OUT THE SOUND SIMULATOR. AT THAT TIME THAT IS WHEN I ASKED CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING.

Q DID ANYTHING THAT HE DID INDICATE TO YOU THAT HE DIDN'T KNOW WHAT HE WAS DOING?

MR. SELBY: OBJECTION. CALLS FOR EXPERTISE.

THE WITNESS: HE WASN'T LISTENING TO ANYBODY. I DIDN'T LIKE THAT.

BY MS. GOODWIN:

Q CAN YOU RECALL SOMEONE WHO WAS TRYING TO INSTRUCT HIM THAT HE DIDN'T LISTEN TO?

A NO. [Answer changed by witness to "EVERYBODY"]

Q THEN YOU STATE, "I DIDN'T LIKE THE WAY ANYTHING WAS HAPPENING ON THE RANGE THAT DAY."

CAN YOU EXPLAIN THAT STATEMENT?

A WELL, PREVIOUS DEMO CLASSES, WE HAD ALWAYS BEEN IN CHARGE.

Q "WE" MEANING?

A THE ENGINEERS.

Q OKAY.

A AND CAPT. FITZGERALD WASN'T BEING REAL COOPERATIVE. HE WASN'T LETTING US FOLLOW OUR LESSON PLAN. YOU KNOW, OUR OUTLINE WE HAD FOR THE CLASS. WE HAD KIND OF DECIDED WE WERE GOING TO SAVE THE SIMULATORS FOR THE END [Witness added "WHEN WE LEARNED OF THEM"], AND THEN HE WANTED RIGHT AWAY TO TAKE THEM DOWNRANGE AND — YOU KNOW, FIRST OFF. HE JUST MORE OR LESS TOOK OVER OUR CLASS.

I WAS OFFENDED BY IT, ANYWAY. I WAS A LITTLE SCARED, TOO.

Q WHO DID HE TAKE OVER THE CLASS FROM?

A SGT. STRICKLER AND MYSELF.

Q IS THERE ANYTHING ELSE YOU CAN THINK OF WHY YOU WERE AFRAID?

A JUST THAT I HAD THE FEELING THAT HIS ATTITUDE WAS — HE WAS IN A REAL BIG HURRY AND WASN'T REALLY THINKING ABOUT WHAT HE WAS DOING. THAT'S WHAT MADE ME WANT TO GET AWAY.

Q WERE THERE ENGINEERS ON THE RANGE THAT DAY?

A YES.

Q TO YOUR KNOWLEDGE, WERE THOSE ENGINEERS ON THE RANGE TO SET UP THE ORDNANCE?

A WE ALL WENT OUT THERE TOGETHER EARLIER IN THE MORNING.

Q WERE THOSE ENGINEERS STOPPED FROM SETTING UP THE ATOMIC SIMULATOR BY CAPT. FITZGERALD?

MR. SELBY: OBJECTION, SPECULATION. I THINK THE WITNESS SAID HE WAS ASLEEP.

MS. GOODWIN: NO, HE WASN'T, BUT OBJECTION NOTED.

THE WITNESS: USUALLY WHEN THEY WERE SETTING UP, CAPT. FITZGERALD JUST PRETTY MUCH WEASLED HIS WAY INTO THE MIDDLE OF EVERYTHING.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 22, 1986, I served the within *Reply in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Paul F. Cronin, Esq.
John D. Thomas, JR., Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Allan S. Haley
419 Broad Street, Suite B
Nevada City, California 95959

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 22, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)

SUPREME COURT OF THE UNITED STATES

WHITTAKER CORPORATION *v.* PERRY D. JENKINS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85-2115. Decided October 20, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The respondents in this case first moved for prejudgment interest 30 days after the entry of judgment in their favor. The District Court treated the motion as one to alter or amend the judgment, and denied it as untimely because it was not filed within ten days of the entry of judgment. See Fed. R. Civ. Proc. 59(e). The United States Court of Appeals for the Ninth Circuit reversed, holding that a motion for prejudgment interest made for the first time after entry of judgment is not a Rule 59(e) motion but a general motion governed by Fed. R. Civ. Proc. 7. 785 F. 2d 720, 723 (1986). This holding conflicts with *Goodman* v. *Heublin, Inc.*, 682 F. 2d 44, 45–47 (CA2 1982). I would grant certiorari to resolve this conflict.